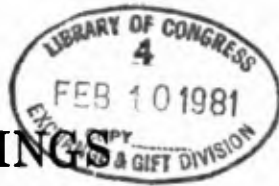




# LEGISLATIVE CHARTER FOR THE FBI

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## HEARINGS

BEFORE THE

SUBCOMMITTEE ON

CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST AND SECOND SESSIONS

ON

**H.R. 5030**

LEGISLATIVE CHARTER FOR THE FBI

---

SEPTEMBER 6, 12, OCTOBER 18, 19, NOVEMBER 8, 13, 15,  
DECEMBER 6, 1979, AND FEBRUARY 7, 1980

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**Serial No. 52**



Printed for the use of the Committee on the Judiciary



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United States Congress House

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# LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, SEPTEMBER 8, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2141, Rayburn House Office Building, the Honorable Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Volkmer, Matsui, McClory, Hyde, Ashbrook, and Sensenbrenner.

Staff present: Catherine LeRoy and Janice Cooper, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today the Subcommittee on Civil and Constitutional Rights begins hearings on H.R. 5030, a bill to create a charter for the Federal Bureau of Investigation. This legislation is the product of several years of intense effort by the FBI and the Department of Justice. It also reflects, at least in part, the comments and criticisms of the House and Senate Judiciary Committees.

Support for a legislative charter for the FBI has been voiced repeatedly in recent years by members of this subcommittee, Members of the House and Senate, the Department of Justice and the FBI itself, as well as outside groups and the American people.

This subcommittee had its first charter hearing more than 3 years ago on February 11, 1976, when former Attorney General Edward Levi and former FBI Director Clarence Kelly appeared before us to discuss the about-to-be-implemented domestic security guidelines. The guidelines were to be the first step toward the goal of defining the Bureau's authority, but legislation was felt by the Attorney General, the Director, any many of us here in Congress to be the crucial next step.

Today we have with us a new Attorney General and a new Director, who are as committed to this goal as their predecessors. Indeed, they have been among the charter's strongest advocates and have invested substantial amounts of their own time and energy in its drafting.

This is Mr. Civiletti's first appearance before us as Attorney General. We are pleased to welcome him back in his new role. In terms of the charter, we are particularly fortunate to have him as the new Attorney General because as Deputy, and as Assistant Attorney General for the Criminal Division, he worked closely with the Bureau both in its day-to-day operations and in drafting the charter. He is not only familiar with the FBI but with the details of the legislative proposal.

Our other witness is, of course, very familiar to us. Director Webster has worked closely with the subcommittee in our efforts to carry out our oversight and authorization responsibilities. We look forward to working as closely with you on the charter, Judge Webster, as we have in the past.

If we are able to enact an FBI charter, it will be a model not only for other Federal investigative agencies but for law enforcement agencies throughout the country. Thus, this is an important task we are undertaking here and I assure you that the efforts of the Judiciary Committee and the Congress on this important legislation will be every bit as intense as the efforts already expended by the Department and the Bureau. This committee will deal with this legislative proposal in a most responsible and expeditious manner.

Before we hear from our witnesses, I recognize the ranking minority member on the House Judiciary Committee, the distinguished gentleman from Illinois, Mr. McClory.

Mr. McCLORY. Thank you very much.

Although not a member of the subcommittee, I am impressed indeed, as you indicated, as ranking member of the full committee, to appear here this morning and to just state in brief and in a few words my general support of the pending legislation to establish for the first time in our history a charter for the Federal Bureau of Investigation.

I am proud indeed to be a sponsor of this legislation, which I hope will be passed out promptly by this subcommittee and will likewise be recommended by the full committee and become part of our statutory law during this Congress at least, if not during this session of Congress.

The legislation which is being proposed, it seems to me, is essential in order to indicate the general authority which the Federal Bureau of Investigation has and should have.

I can't help but feel that we have in the FBI the greatest investigative agency in the entire world, and yet it must be recognized that there has been some loss of confidence, there has been some sharp criticism of some of the actions that have occurred in recent years. What this legislation will do, it seems to me, is to reestablish the longtime, fine reputation of the FBI and it will assist, too, the personnel of the FBI and the Director in the performance of their task.

I am certain that some have felt restraints because of an uncertainty as to what the scope of their authority is, and consequently this legislation will delineate in general terms the general thrust of their authority and at the same time indicate some of the actions which are not acceptable in connection with the enforcement of the law and the investigation of criminal activity.

So I hope that we can act promptly on this. I hope that we are very cautious about any substantial amendments to this proposal and that the subcommittee will regard this as an item of very high priority as a legislative proposition during the 96th Congress.

I won't be able to stay for full hearings since I must attend a meeting of the House Intelligence Committee, on which I also serve, but I am pleased indeed to be here and to join in welcoming the distinguished leadoff witnesses this morning.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. McClory, for your valuable comments.

The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. No comment.

Mr. EDWARDS. Mr. Attorney General, before I recognize you, we have with us the ranking minority member of the subcommittee, who is making his way to the podium, the gentleman from Illinois, our good friend, Mr. Hyde.

Mr. HYDE. I humbly apologize. I am very pleased to be here, and this is one of the most important items of legislation with which we are going to deal. It is controversial, but it is significant. I think it is also overdue. So that is all I have to say except that I welcome you and assure you I will pay strict attention.

Mr. EDWARDS. Thank you, Mr. Hyde.

Mr. Attorney General and Judge Webster, you may proceed.

**TESTIMONY OF BENJAMIN R. CIVILETTI, THE ATTORNEY GENERAL  
OF THE UNITED STATES AND WILLIAM H. WEBSTER, DIRECTOR,  
FEDERAL BUREAU OF INVESTIGATION**

Mr. CIVILETTI. Thank you, Chairman Edwards, and good morning, Congressmen.

We are pleased to be here this morning. I think my statement in its entirety is much longer than Judge Weber's. I don't intend to read it all but will submit it for the record and then highlight it from time to time.

Mr. EDWARDS. Without objection, the entire statement will be made a part of the record.

[The information follows:]

**STATEMENT OF BENJAMIN R. CIVILETTI, ATTORNEY GENERAL**

Mr. Chairman: It is a pleasure to appear before the Subcommittee on Civil and Constitutional Rights this morning to endorse H.R. 5030, the proposed charter for the FBI. The proposal submitted by this Administration and introduced by Chairman Rodino for himself, Mr. Glory, Mr. Hyde and Mr. Sensenbrenner, was the product of extensive work over a long period of time. We believe it is a sound charter which will enhance civil and constitutional rights and, at the same time, strengthen law enforcement. We hope that it will receive favorable consideration before this Committee and ultimately the full Senate and House of Representatives.

The Charter is intended to be a constitution for the FBI. Its main purpose is to define the jurisdiction and duties of the FBI. It is not and should not be a rigid encyclopedia of do's and don't's, nor an exhaustive code of incomprehensible regulations.

The charter is a comprehensive charter, for it deals with the fundamental authority and responsibility of the FBI in every important part of the Bureau's work. But it will not stand alone. There are also other important statutes, Attorney General guidelines, manuals and other regulations which govern the work of the FBI. For example, the full range of the federal criminal laws, as well as state and local laws, apply to all Department of Justice and Bureau personnel. Second, the body of constitutional and other case law, both civil and criminal, continues in full force and effect. These civil and criminal remedies supplement the provisions within the charter itself to ensure that the FBI enforces the law within the law. In addition, there are existing mechanisms and practices for congressional oversight, Department review, and internal disciplinary investigations and compliance audits.

The charter is intended to be the foundational statement of the basic duties and responsibilities of the FBI and also its general investigative powers and the principal minimum limitations on those powers. But it need not and should not contain exhaustive, detailed and lengthy provisions on all these matters. After all, the charter will be supplemented by several other provisions, not in statutory form. First, the charter will be interpreted, as all statutes are, by reference to legislative history which this committee will carefully develop. In this regard, our proposal was accompanied by an extensive section-by-section analysis or commentary designed to explain and interpret the intent behind various provisions of the charter and to make clear the meaning of the charter

language. It is expected that this commentary would serve as one key source for the development of legislative history, together with the series of hearings which start today and other materials which will be developed in the normal legislative process. Second, the charter expressly requires the Attorney General to promulgate guidelines in some eight major areas of FBI activity. As you know, guidelines were promulgated by former Attorney General Levi in 1976 concerning three areas:

- (1) Domestic Security Investigations;
- (2) Informants;
- (3) Civil Disturbances.

These guidelines will be supplemented by additional provisions and by new guidelines in each of the other areas required by the charter.

I believe that the experience in the past three years with the Levi guidelines has been highly encouraging. It has demonstrated that guidelines can be drawn which are well understood by Bureau personnel and by the public and which can be filed and reviewed by the appropriate Congressional committees. It has also shown that guidelines can be successfully applied to particular kinds of investigative activity and even to certain specific decisions made on a case-by-case basis. The reasonable conclusion which can be drawn from the success of these guidelines is that the charter need not detail every limitation or safeguard by express statutory terms. Such details are better covered in guidelines, with the charter setting forth the obligatory principles and objectives which the guidelines must meet and achieve.

I would like to assure the committee that the guidelines to be written will be thorough, that they will be drafted in consultation with appropriate members and staff of the oversight committees, that they will be promulgated at the earliest possible time, and that they will fully meet the objectives set forth in the charter. I can report to the Committee that the initial work on guidelines has already begun by teams of selected lawyers in the Department and appropriate officials in the Bureau. A review group will make recommendations to the Attorney General once the initial process of drafting and revision has been completed.

Please bear in mind that in promulgating guidelines, the Attorney General can and may choose on the basis of advice and contemporaneous information and developments to impose additional or even higher standards or levels of authorization and review than those minimum levels contained in the charter itself.

Turning to the charter itself, I would like to point out that it is an integrated document, that is, various provisions located in different sections work together. Recognizing this inter-relationship is critical to understanding the purposes and effects of the charter, both in terms of what it authorizes the FBI to do and what it prevents the FBI from doing. In a very overly simplified way, the charter consists essentially of four types of provisions:

- (1) Provisions containing general principles by which all criminal investigations must be conducted;
- (2) Provisions which limit who and what can be investigated and establish threshold requirements which must be met before an investigation can even be started;
- (3) Provisions which authorize and limit the use of the various sensitive investigative techniques;
- (4) Provisions which limit retention of information collected during investigations and the specific purposes and parties for which investigative information can be disseminated outside the FBI.

The charter is intended as an exclusive statement of jurisdiction. Accordingly, if authority for a particular kind of investigative activity is not found in the charter, there is no authority. Therefore, for example, activity of the type associated with COINTELPRO is not authorized in the charter; therefore, it is precluded absolutely as outside the jurisdiction of the FBI.<sup>1</sup>

The broad purpose and intention of the charter is aimed at criminal activity under criminal standards. Specifically, before an investigation can be initiated, there must be "facts" indicating a criminal violation, and the purpose of the investigation and the manner of carrying out the investigation must be directed toward and limited to three purposes:

- (1) The detection of crime;
- (2) The prevention of crime; and
- (3) The prosecution of criminal offenders.

<sup>1</sup> In addition, Exhibit 1, attached hereto, lists the Charter provisions which by their terms or necessary effects prohibit the improper activities commonly referred to as COINTELPRO.

Nevertheless, in order to remove any doubt whatever, the charter explicitly commands that there shall be no investigation by the FBI of the lawful exercise of the right to dissent—the right to peaceably assemble and petition the government, or of any other right guaranteed by the Constitution and laws of the United States.

The heart of the charter is Subchapter III which contains the basic authorization for the FBI to conduct criminal investigations. The key section is Section 533 which contemplates investigation on two levels:

- (1) Preliminary investigations which are called "inquiries";
- (2) Full investigations which are called simply "investigations."

The purpose of inquiries is limited to determining rationally whether there is a basis for conducting an investigation. The purpose of an investigation, of course, is to collect evidence on which to base a prosecution as well as to seize evidence, fruits and tools of crime and to apprehend perpetrators.

We believe it is essential for the FBI to have specific authority to conduct brief preliminary activities called "inquiries", which are far more limited in duration and scope than investigations. Otherwise, the government would be powerless to act even tentatively on specific allegations of crime which did not meet the requirement of "facts or circumstances" that would reasonably indicate criminal activity. This is the standard that must be met before an "investigation" could be initiated. However, such allegations frequently contain sufficient information to demonstrate a substantial risk and to make it clear as a matter of common sense that some effort should be made to determine if there is some substance to the allegation.

It is important to emphasize that the inquiries ordinarily are of very short duration. Frequently, they can be completed in a matter of a few weeks. Also, their purpose is limited to making an initial assessment of the validity of the allegation or general information; they are not a means for attempting to secure evidence for prosecution. Moreover, in most inquiries it is not necessary to resort to sensitive investigative techniques. Generally, inquiries are limited to interviewing persons, checking existing law enforcement files and reviewing other publicly available information.

Section 533 which contemplates two levels of investigation also specifically identifies two different kinds of investigation:

- (1) Investigation of a specific criminal act;
- (2) Investigation of an ongoing criminal enterprise engaged in either racketeering or terrorist activities.

The investigation of a specific criminal act, such as an interstate theft, ordinarily does not involve great issues of sensitivity from either a legal or a policy standpoint. Moreover, the scope of such investigations is self-defining since the essential purpose of the investigation is plainly limited to identifying and apprehending the criminal and proving the elements of the particular crime. The duration of such a criminal investigation cannot be projected because it depends on circumstances which vary enormously from one case to another, but what can be said with confidence is that such an investigation ordinarily ends with the indictment of the subject.

The second type of investigation concerns ongoing criminal enterprises engaged either in racketeering or terrorist activities. Special and broader investigative authority is necessary in these two narrowly defined areas because the ongoing nature and the organizational strength of these criminal groups poses real and special problems for society and for law enforcement. In order to effectively combat these threats, we believe it is necessary that the FBI be authorized to conduct investigations which are substantially greater as to scope, duration and emphasis on future criminal acts than the investigations authorized in section 533(b)(1). To be effective, racketeering and terrorist investigations need to focus not only on particular criminal acts, whether past, present or future, but also on the overall membership of the criminal group, its financing, its capabilities for various kinds of harm, its plans, its relationship to other criminal groups, its possible targets, etc. These considerations are generally outside the scope of a regular criminal investigation of a specific act because that investigation is limited to collecting evidence to approve the specific elements of the offense involved. Similarly, it is necessary to continue to investigate racketeering and terrorist groups as long as they retain vitality, even though a particular member, or members may have been apprehended, prosecuted and sent to prison. Thus, enterprise investigations will continue as long as the group continues its criminal enterprise activity.

We recognize that the ongoing nature of such groups requires us to investigate broadly into past acts, current activity and potential for future criminal acts. While demonstrably necessary in order to protect the society from very great

harm, enterprise investigations, we acknowledge, may create apprehension of danger to lawful activities, privacy interests, and constitutionally protected free speech and association. To guard against this potential threat, we have fashioned these provisions far more tightly than those concerning ordinary investigation of specific offenses.

First, we have limited the investigation to circumstances where there is "reasonable indication" of crime so that the same level of certainty is required to open a racketeering or terrorist enterprise investigation as to open more conventional investigation focusing on particular acts. Secondly, we have very deliberately limited the basis of the investigation to activities which are clearly criminal and serious. This plainly precludes FBI from investigating all forms of non-criminal activities. Third, in both the case of racketeering and terrorism, we have specifically required that there be information indicating that the enterprise presently exists, that it is a continuing enterprise, and that its essential nature and purpose is criminal. Thus, we have excluded circumstances which involve little more than speculation that a group that is now lawful may later adopt a criminal philosophy.

Terrorism enterprise investigations are generally believed to be more sensitive than racketeering enterprise investigations since the former avowedly involve some political purposes and motivations while the latter ordinarily do not. We felt that the necessities and realities of modern day society requires us to authorize FBI to conduct terrorism investigations on the same standard as organized crime investigations. That is, we require the same standard of reasonableness; facts or circumstances which reasonably indicate the criminal enterprise. However, in recognition of their greater sensitivity and for protection for all lawful political activities, we have provided special safeguards which apply to only terrorism enterprise investigations. These include special standards and limitations on informant infiltration, extra report requirements for opening and the continuation of terrorist enterprise investigations, the involvement of high level FBI officials, including the Director, and notice to the Attorney General or his designee of investigations which continue beyond one year.

It must be emphasized that the group which can be investigated under this subsection is only the actual criminal enterprise. Where that group is a subgroup of a larger organization which is engaged in lawful political activity, the larger group itself cannot be investigated. Finally, the investigation must be conducted pursuant to Attorney General Guidelines. As you know, we presently are governed by the Levi Domestic Security Guidelines for terrorist investigations. These Guidelines will be continued and, if amended at all, will be strengthened.

Another most important part of the charter is section 533(b) which contains limitations on the use of the more sensitive investigative techniques. The section mandates that the Attorney General issue guidelines concerning the sensitive techniques covered by the section which are:

- (1) Informants and Undercover Agents;
- (2) Physical Surveillance;
- (3) Mail Surveillance;
- (4) Electronic Surveillance;
- (5) Access to Third Party Records;
- (6) Access to Tax Records;
- (7) Miscellaneous investigative techniques (including trash covers, pen registers, consensual monitoring, electronic location detectors, covert photographic surveillance and pretext interviews).

Of course, mail and electronic surveillance are already covered by explicit statutes and court decisions and require judicial warrants. The others are discussed in some detail in the charter itself, particularly informants and access to third-party records pursuant to the new investigative demand authority which the charter would give to the FBI.

The section requires that the guidelines meet three important and express limiting purposes:

- (1) To ensure that the investigative techniques are used in such a way as to keep intrusion into privacy to a minimum;
- (2) To require that the greater the potential intrusion into a true area of privacy, the more formalized and higher level the review and authorization procedures must be;
- (3) To ensure that information obtained through the use of sensitive techniques is used by the FBI only for lawful and authorized purposes as set forth in the charter itself.

This section also authorizes the FBI to issue investigative demands, which are similar to administrative subpoenas, for specific categories of records:

- (1) Toll records of communications common carriers, such as the phone company;
- (2) Insurance records maintained by insurance companies or agencies;
- (3) Records of credit institutions not covered by the Financial Right to Privacy Act of 1978;
- (4) Banking and other financial records that are covered by that Act.

Concerning bank records and other records covered by the Right to Financial Privacy Act, the charter simply grants the FBI authority to issue an investigative demand which is contemplated by that Act and specifies that every procedural requirement of the Act must be followed to the letter.

Briefly, the need for the investigative demand power arises from the following circumstances. First, the FBI has been giving increased priority recently to investigation of white collar crime, public corruption, fraud against government programs, financing of organized crime groups and other similar areas. In each of these areas, ability to obtain financial records is important to success, and indeed it is hard to make real progress in such an investigation without access to these kinds of records. Second, the FBI previously obtained many of these kinds of records on a voluntary basis from the custodians. But it has recently encountered a growing reluctance of custodians to turn over such records for fear of possible legal liability or loss of trade from favored customers. As a result, the FBI in most places has recently lost the capacity to get these records.

Rules governing issuance of investigative demands would be covered by guidelines which the charter requires the Attorney General to issue. As I mentioned earlier, the initial work on producing the guidelines in this and all the other areas has already begun. I would expect that the use of investigative demands would be limited to cases where there was a demonstration of need, where there was a substantiated allegation, and where a grand jury was not already involved in obtaining records on the matter. However, more detailed rules must await the completion of the study, review, and drafting that is now underway.

The limitations in this section of use of informants, particularly their use to infiltrate groups under investigation for terrorism, is of special concern to many, including some on this Committee. First, the charter seeks to prevent unreliable or truly uncontrollable persons from becoming regular informants in the first place by requiring a background investigation of each potential informant. Second, written approval must be given by a supervisory level FBI official before the informant can be used on a continuing basis to provide information on a particular person. Such approval must include findings that, based on the background investigation, the person is "suitable" for use as an informant, and that he is likely to have information pertinent to matters which the charter authorizes the FBI to investigate. Third, these findings must be reviewed on a regular basis by the Director or his designee. Fourth, the informant must be told that under no circumstances may he instigate or initiate a plan to commit criminal acts or use illegal techniques such as break-ins or wiretaps without court warrant, to obtain information or evidence on behalf of the FBI. He must also be warned not to engage in violence. Finally, he is told that his working as an informant for the FBI will not protect him from prosecution for participating in criminal activity except the activity which is under investigation and even then only if a supervisory official determines in writing that such participation is justified because it is necessary to getting information or saving lives and this need outweighs the seriousness of the conduct the informant is to participate in. Moreover, these determinations must be reviewed annually by the Director or his designee.

In addition to all this, before an informant may infiltrate a terrorist group, the group itself must be properly under investigation for violent crimes and the infiltration must have been found "necessary" under the circumstances in a written finding by a supervisory official.

The charter provides for enforcement in a number of ways. First, the charter, as I mentioned before, relies on the existing criminal law which applies to FBI agents, justice department attorneys and everybody else. As you know, the law is plain on matters such as wiretapping without court warrant and breaking into homes without warrants, and prosecutions have been brought in such cases. Secondly, there is the full range of civil suits which can be brought against government officials who act illegally and without authority. Thirdly, the charter depends for enforcement on the internal disciplinary system of the FBI. This is highlighted by the requirement under Duties of the Director, that the Director

must maintain an "effective" internal disciplinary system. Moreover, the charter adds further sanctions by authorizing the Director to impose fines for up to \$5,000 for willful violations of the section of the charter governing the use of sensitive investigative techniques. Accordingly, we believe that the charter is enforceable and will be complied with. There is simply no need to create new civil suits, new criminal offenses, or new procedural rights for defendants.

With this brief summary of some of the charter's key provisions, I would like to conclude my remarks by saying simply that we look forward to discussing the specific terms of the charter with the Committee at future hearings. I would be pleased to answer any questions on the main thrust of the proposal.

#### EXHIBIT 1—PROVISIONS BARRING COINTELPRO

1. Section 531a: General Principles.  
 Subsection (c): Investigation of Criminal Conduct only (p. 4).  
 Subsection (d): Limitations.  
 No investigation of:  
 Political views;  
 Peaceable assembly;  
 Exercise of other rights.
2. Section 531a(b): Investigations must be conducted with minimal intrusion (p. 4).
3. Section 533(b)(3): Terrorist Enterprise (p. 11).  
 Investigation only if:  
 Significant criminal violence for purpose of political intimidation, and  
 Facts or circumstances reasonably indicate.
4. Section 533a: Attorney General Guidelines for Investigation of Criminal Matters (p. 13).  
 Subsection (a)(1): Investigation must "focus" on criminal activity; purposes of investigation must be limited to:  
 Detection;  
 Prevention;  
 Prosecution.
5. Section 533b(a)(3): General Restrictions.  
 Information may be used "only for lawful government purposes" (p. 14).
6. Section 533c: Retention, dissemination and destruction of information (p. 26).  
 Subsection (a):  
 Retain only what's pertinent to investigations authorized by charter.  
 (b) Disseminate only for proper official uses, e.g., to local police on a matter within their investigative jurisdiction.

Mr. CIVILETTI. I think in terms of expedition, as well as perhaps good sense, Judge Webster, with your permission, should go forward first, then I will highlight the sense of my statement and then we will both respond to any questions which you or members of the committee may have with regard to any of the subject matters, as the case may be. If that is satisfactory to you, we will proceed in that manner.

Mr. EDWARDS. It is satisfactory.

Mr. WEBSTER. Thank you, Mr. Chairman.

I am pleased to be here this morning to testify in support of H.R. 5030, a bill that would create a legislative charter for the Federal Bureau of Investigation.

The drafting of the proposed charter is the outgrowth of FBI guidelines covering domestic security investigations, civil disorders and the use of informants, established by Attorney General Levi in April 1976. The Bureau's participation in the drafting process represents an unprecedented effort by an agency to formulate legislative standards governing its conduct.

The mission of the FBI is unmistakably clear—to uphold the law. In a nation of increasingly complex and competing values, it has not always been so clear just how that mission is to be accomplished.

The statutory jurisdiction of the FBI has long been derived from a single paragraph in the United States Code which gives the Attorney General the power to appoint officials "to detect and prosecute crime against the United States." This authority has been supplemented from time to time by a series of Executive orders and Presidential directives and statements, and by several statutes that give the Bureau special responsibilities to investigate particular crimes.

The proposed charter would bring these authorities together in one statute and would provide the first exclusive statement of the FBI's duties and responsibilities outside the field of foreign intelligence and foreign counterintelligence. We believe that it will give the public major assurance that the Bureau is acting within the law to achieve the legitimate ends of law enforcement. It will permit agents to meet their responsibilities with greater confidence and effectiveness and without fear of legal liability. And it will provide a clear mandate for the FBI to do what the American people expect of us in a way that the Constitution demands of us.

The charter embodies certain fundamental principles that provide a steady direction for the FBI's investigative activities. Among them is the notion that an FBI investigation should be no more intrusive into the lives of individuals than is necessary.

The charter also requires, as Attorney General Stone emphasized, that investigation must focus on conduct, and only such conduct, as is proscribed by the criminal laws. Underscoring this principle in the charter is a provision which states unequivocally that the lawful exercise of the right to dissent or other exercise of constitutional rights cannot justify an investigation when no criminal activity is involved.

Every effort was made during the drafting process to strike a healthy balance between the need to protect individual rights and the need to provide effective law enforcement. For example, in drafting provisions concerning terrorist activity, it was recognized that the FBI must be equipped to deal with terrorist threats at the earliest possible moment.

At the same time, however, great care was taken to prevent infringement of constitutionally protected activities. Safeguards—including higher levels of review in the FBI and the Justice Department—are incorporated into the charter to insure that constitutionally protected acts are distinguished from those that may lead to violence and serious disruption of society.

The enactment of a statutory charter for the FBI is a goal worthy of the best of all of us. Indeed, the product presented here has been a cooperative effort in the finest tradition of lawmaking. As it enters the legislative process, I am confident that it will withstand the most severe scrutiny—both from those who worry about potential excesses by law enforcement in a free society, and those who are apprehensive that law enforcement may be regulated into ineffectiveness.

The distinguished bipartisan support for this charter should allay some of those concerns. I am proud to endorse this proposal. It demands professionalism from the FBI. It enables us to do our work with confidence and effectiveness within the rule of the law.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Attorney General.

Mr. CIVILETTI. Mr. Chairman, it is a pleasure to appear before you this morning for my first testimony. I think, before the House as

Attorney General, and it is appropriate to appear on this subject before your committee and the distinguished Congressmen that serve on it.

H.R. 5030, the proposal submitted by this administration and introduced by Chairman Rodino for himself, Mr. McClory, Mr. Hyde, and Mr. Sensenbrenner, was a product of extensive work over a long period of time both by Director Webster and myself, the FBI itself, and many of its members, and Members of Congress, and other groups who participated and made suggestions and revisions.

We believe it is a sound charter which will enhance civil and constitutional rights and at the same time strengthen law enforcement. We hope that it will receive favorable consideration before the committee and ultimately the full Senate and House of Representatives.

The basic framework of this charter is intended and designed to be a constitution for the FBI. Its purpose is to define the jurisdiction and the duties of the Bureau. It is not and should not be an encyclopedia of do's and don'ts, nor an exhaustive code of incomprehensible regulations. But the charter is a comprehensive integrated charter, for it deals with the fundamental authority and responsibility of the FBI in every important part of its work.

It won't stand alone. There are also other important statutes, Attorney General guidelines, manuals, and other regulations which govern the work of the FBI. For example, the full range of the Federal criminal laws as well as State and local laws apply to all Department of Justice and Bureau personnel.

Second, the body of constitutional and other case law, both civil and criminal, continue in full force and effect. These civil and criminal remedies supplement the provisions within the charter itself to insure that the FBI enforces the law within the law.

In addition, there are existing mechanisms and practices for congressional oversight, for departmental review, and for internal disciplinary investigations and compliance audits.

Speaking for a moment about guidelines—as you know, guidelines were promulgated by former Attorney General Levi in 1976 concerning three basic areas: Domestic security investigations, informants, and civil disturbances. These guidelines will be supplemented by additional provisions and by new guidelines in each of the other areas required by the charter.

The experience that we have had over the last 3 years with the Levi guidelines has been highly encouraging. It has demonstrated that guidelines can be drawn which are reasonably well understood by Bureau personnel and by the public and which can be filed and reviewed by the appropriate congressional committees.

It has also shown that guidelines can be successfully applied to particular kinds of investigative activity and even to certain specific decisions made on a case-by-case basis.

The reasonable conclusion which can be drawn from the success of these guidelines is that the charter need not detail every limitation or safeguard by express statutory terms. Such details are better covered in guidelines, with the charter setting forth the obligatory principles and objectives which the guidelines must meet and achieve and with the allowance for congressional input, oversight, and review present in the guidelines as well as the statutory foundation for them, which would be the charter.

As to the charter itself, it has essentially four types of provisions: Provisions containing general principles by which all criminal investigations must be conducted; provisions which limit who and what can be investigated and establish threshold requirements which must be met before an investigation can be started; three, provisions which authorize and limit the use of the various sensitive investigative techniques and; four, provisions which limit retention of information collected during investigations and the specific purposes and the parties for which investigative information can be disseminated outside of the FBI.

The charter is intended as an exclusive statement of jurisdiction. Accordingly, if authority for a particular kind of investigative activity is not found in the charter, there is no such authority. Therefore, for example activity of the type associated with Cointelpro is not authorized in the charter and, therefore, it is precluded absolutely as outside the jurisdiction of the FBI.

But in addition to that, because from time to time, since the public disclosure of the charter, we have heard comments concerning Cointelpro and its prohibition, I have included as exhibit 1 a reference to the various sections of the charter which by their terms and meaning and implications would prohibit the type of activity, particularly the improper or inappropriate activities associated commonly with the term Cointelpro.

The broad purpose and intention of the charter is aimed at criminal activity under criminal standards. Specifically, before an investigation can be initiated, there must be facts indicating a criminal violation, and the purpose of the investigation and the manner of carrying out the investigation must be directed toward and limited to the detection of crime, the prevention of crime, and the prosecution of criminal offenders.

Nevertheless, in order to remove any doubt whatever the charter explicitly commands that there shall be no investigation by the FBI of the lawful exercise of the right to dissent, the right to peaceably assemble and petition the Government, or of any other right guaranteed by the Constitution and the laws of the United States.

The heart of the charter is subchapter III which contains the basic authorization for the FBI to conduct criminal investigations, and the key section within that subchapter is section 533, which contemplates an investigation on two levels: Investigations based on (1) publicly available information with limited intrusion, limited in time and limited in scope, which could be more properly called an inquiry, to see whether or not there is a threshold standard to be met, based on facts, to open a true and real or full investigation.

The purpose of the inquiry is limited to determining rationally, not on whim or suspicion or hunch, whether there is a basis for conducting an investigation. The purpose of the investigation, of course, is to collect evidence on which to base a prosecution as well as to seize evidence, fruits and tools of crime, and to apprehend perpetrators.

We believe it essential for the Bureau to have specific authority to conduct brief preliminary activities called inquiries, which are far more limited in scope and duration than investigations, without which we think we would be handicapped, the Bureau would be, and the ability to detect and prevent crime would be lost.

We think it important to emphasize that the inquiries ordinarily will be short. Frequently they will be completed in a matter of a few weeks. Also, their purpose is limited to making an initial assessment of the validity of the allegation or general information and they are not a means for attempting to secure evidence for prosecution.

Moreover, in most inquiries it is not necessary to resort to any sensitive investigative techniques. Generally, inquiries are limited to interviewing persons, checking existing law enforcement files and reviewing other publicly available information.

There will be two different kinds of investigations. One, investigation of a specific criminal act, and that will be the most common, the most frequent and the most regular of all of the thousands of investigations that the FBI performs.

Two, investigation of an ongoing criminal enterprise engaged in either of only two subject matters: racketeering or terrorist activities.

The investigation of a specific criminal act such as an interstate theft ordinarily does not involve great issues of sensitivity, either from a legal or a policy standpoint.

Moreover, the scope of such investigations is usually self-defining since the essential purpose of the investigation is mainly limited to identifying and apprehending the criminal and proving the elements of the particular crime. The duration of such a criminal investigation cannot be projected because it depends on circumstances which vary enormously from one case to another, but what can be said with some confidence is that such an investigation ordinarily ends with the indictment of the subject.

The other type investigation which I mentioned concerns ongoing criminal enterprises engaged either in racketeering or terrorist activities. Special and broader investigative authority is necessary in these two narrowly defined areas because the ongoing nature, the organizational strengths of these criminal groups poses real and special problems for society and for law enforcement. In order to effectively combat these threats we believe it is necessary that the Bureau be authorized to conduct investigations which are substantially greater as to scope, duration, and emphasis on future criminal acts than the investigations authorized in the first part, 533(b)(1).

To be effective, racketeering and terrorist investigations need to focus not only on particular criminal acts, whether past, present or future, but also on the overall membership of the criminal group, its financing, its capabilities for various kinds of harm, its plans, its relationship to other criminal groups, and its possible targets. These considerations are generally outside the scope of a regular criminal investigation of a specific act because that investigation is limited to collecting evidence to prove the specific elements of the offense involved.

Similarly, it is necessary to continue to investigate racketeering and terrorist groups as long as they retain vitality, even though a particular member or members may have been apprehended, prosecuted, and sent to prison.

Thus, enterprise investigations will continue as long as the group continues its criminal enterprise activity. Of course, we recognize that the ongoing nature of such groups requires us to investigate broadly into past action, current activities and potential for future criminal harm.

While demonstrably necessary in order to protect society from very great harm, enterprise investigations may create apprehension or anxiety of danger to lawful activities, privacy interests and constitutionally protected free speech and association.

To guard against this potential threat or apprehension, we have fashioned these provisions far more tightly than those concerning ordinary investigations of specific offenses.

We have limited the investigation to circumstances where there is reasonable indication of crime so that the same level of certainty is required to open a racketeering or criminal terrorist enterprise investigation as to open the more simple and conventional investigation focusing on particular acts.

Second, we have deliberately limited the basis of the investigation to activities which are clearly criminal and serious. This precludes the FBI from investigating all forms of noncriminal activities.

Third, in both the case of racketeering and terrorism we have specifically required that there be information indicating that the enterprise presently exists, that it is a continuing enterprise and that its essential nature and purpose is criminal. Thus we have excluded circumstances which involve little more than speculation that a group that is now lawful may later adopt a criminal philosophy or any other group which is associated and continuing for a lawful purpose, one or more of the members of which may from time to time commit either an incidental crime or even a connected crime.

Terrorist enterprise investigations are generally believed to be more sensitive than racketeering enterprise investigations, since the former involves some political purpose and motivation while the latter, the racketeering investigations, ordinarily do not.

We feel that the necessities and realities of modern-day society require us to authorize the FBI to conduct terrorism investigations on the same standard as organized crime investigations; that is, we require the same standard of reasonableness, facts or circumstances which reasonably indicate the criminal enterprise, its purpose and intent.

However, in recognition of that greater sensitivity and for protection for all lawful political activities, we have provided safeguards which apply to only terrorism, enterprise investigations: special standards and limitations on informant infiltration, extra report requirements for opening and continuation of terrorist enterprise investigation, the involvement of high level FBI officials, including the Director, in passing on and reviewing the investigations, and notice to the Attorney General or his designee of all such investigations which continue beyond one year.

It must be emphasized that the only group which can be investigated under this subsection is the actual criminal enterprise group. Where that group is a subgroup of a larger organization, which is engaged in lawful political activity, the larger group itself cannot be investigated.

Finally, the investigation must be conducted pursuant to specific Attorney General guidelines. As you know, we presently are governed by the Levi Domestic Security Guidelines for terrorist investigations. These guidelines will be continued and if amended at all, will be strengthened.

Another most important part of the charter is section 533(b) which contains the specific limitations on the use of the more sensitive or

more intrusive investigative techniques. That section mandates that the Attorney General issue guidelines concerning these techniques, which are listed on page 13 of the testimony, and include informants and undercover agents, physical surveillances, mail surveillance, electronic surveillance, and so forth.

Of course, mail and electronic surveillances are already covered by explicit statutes, court decisions and require judicial warrants. The others are discussed in some detail in the charter itself, particularly informants and access to third party records pursuant to the new investigative demand authority which the charter would give to the FBI.

I might pause there for a moment to emphasize that the new investigative demand authority which the charter would provide is limited in scope with regard to the type records obtainable and, most importantly, it incorporates the same set of principles of standing, third party review, opportunity to object and notice, under most circumstances, as provided in the Financial Privacy Act which was part of the 1978, I believe, bank reform bill, which was passed by the Congress just this past session, and which has gone into effect and which we have been working with for about 3 or 4 months or so now, and there are some wrinkles in it, but we think that it is sound, it is sound for privacy considerations, and expectation of privacy of citizens as well as sound for law enforcement purposes and will not handicap us or tie the hands of the Bureau and other investigative agencies, and this authority given to the Bureau in the charter tracks the balance between access and protection to the privacy rights, notice and standing provisions to third parties, provided in that legislation.

The need for the investigative demand arises from the following circumstances.

First, the FBI has been given increasing priority recently, to investigating white collar crime, public corruption, fraud against the Government, financing of organized crime groups, and other similar areas. In each of these type investigations the ability to obtain financial records is important to success, and indeed it is hard to make any real progress without access to these kinds of records.

Second, the FBI previously obtained many of these records on a voluntary basis from the custodians, but it has recently encountered a growing reluctance of custodians to turn over such records for fear of possible legal liability or loss of trade from favored customers who determine that their records have been examined and complain about it.

As a result, the FBI in most places has recently lost the capacity to get these records voluntarily.

Rules governing the issuance of investigative demands would be covered by guidelines which the charter requires the Attorney General to issue.

As I mentioned earlier, the initial work of producing the guidelines in this and all the other areas—and I believe there are eight areas—has already begun and I would expect that the use of investigative demands would be limited to cases where there was a demonstration of need, where there is a substantiated allegation and where a grand jury was not already involved in obtaining records on the matter.

However, more detailed rules must await the completion of the study, review and drafting that is now underway.

The limitations in this section of use of informants, particularly their use to infiltrate groups under investigation for terrorism, is of special concern to many, including some on this committee, I am sure. With regard to that, first, the charter seeks to prevent unreliable or truly uncontrollable persons from becoming regular informants in the first place, by requiring a background investigation of each potential informant.

Second, written approval must be given by a supervisory level of FBI official before the informants can be used on a continuing basis, and such approval must include findings that based on the background investigation the person is suitable for use as an informant and that he is likely to have information pertinent to matters which the charter authorizes the Bureau of Investigation.

Third, these findings must be reviewed on a regular basis by the Director or his designee.

Fourth, the informant must be told that under no circumstances may he instigate or initiate a plan to commit criminal acts or use illegal techniques, such as break-ins or wiretaps, without a court warrant, to obtain information or evidence on behalf of the FBI.

An informant must also be warned not to engage in violence and, finally, he is told that his working as an informant for the FBI will not protect him in prosecution for participating in criminal activity except where the activity which is under investigation, and even then only if a supervisory official determines in writing that such participation is justified because it is necessary to getting information or saving lives and this need outweighs the seriousness of the conduct the informant is to participate in.

Moreover, these determinations must be reviewed annually by the Director or his designee for compliance.

In addition to all of this, before an informant may infiltrate a terrorist group the group itself must properly be under investigation for violent crimes and the infiltration must have been found necessary under the circumstances in a written finding by an FBI supervisory official.

The charter provides for enforcement in a number of ways. It relies, of course, on the existing criminal law to which we are all subject and, as you know, the law is plain on matters such as wiretapping without court warrants, breaking into homes without warrants, and prosecutions have been brought in such cases.

Second, there is a full range of civil suits which can be brought against Government officials, who act illegally without authority, and third, the charter depends for enforcement on the existing internal disciplinary system of the FBI. This is highlighted by the requirement under duties of the Director, that the Director must maintain an effective internal disciplinary system.

But in addition to that framework, the charter adds further sanctions by authorizing the Director to impose fines for up to \$5,000 for willful violations of the sections of the charter governing the use of sensitive investigative techniques.

Accordingly, we believe the charter is enforceable and will be complied with and we do not believe there is need to create new causes of civil actions, new criminal offenses or new procedural rights for defendants.

That concludes my highlighting of the summary of the charter's key provisions and I will be glad to respond to questions and Director Webster, too.

Mr. EDWARDS. Thank you very much, Mr. Attorney General.

There is a vote on the floor. The subcommittee will recess for 10 minutes.

[A brief recess was taken.]

Mr. EDWARDS. The subcommittee will come to order.

Pursuant to the House rules, we will be operating under the 5-minute rule.

The gentleman from California, Mr. Matsui.

Mr. MATSUI. Thank you. I just have a few questions. Thank you both, Mr. Webster and Mr. Civeletti.

Mr. Webster, I would like to ask you is there anything in this proposed charter that you feel would hamper your current types of investigations that you normally get involved in?

Mr. WEBSTER. Congressman Matsui, I think the answer is no. We are currently operating under substantially all of the restraints that you find in the charter. I looked over them very carefully and I am confident we can do as good a job or a more effective job under the charter than we are presently doing.

Mr. MATSUI. You feel with the current information you have about this document, then, that you would not have to come back to this committee or subcommittee a year from now, if we adopt this, and say I need an amendment because it is too restrictive, or something of that nature?

Mr. WEBSTER. No, I think not. That is one of the reasons that the Attorney General and I have both urged the use of guidelines in areas where we need flexibility and need experience and where we can come back and modify guidelines without having to go through the legislative process. But insofar as the bill is concerned, the statute, I would not anticipate any need for changes.

Mr. MATSUI. On another subject, I note that both FBI and the Department of Justice are very concerned about the Freedom of Information Act. How does the Freedom of Information Act tie in with this proposed charter, if at all?

Mr. WEBSTER. Well, as I see it, the Freedom of Information Act, of course, affects all agencies and could not properly be addressed in this bill alone. There are some provisions which authorize the Attorney General to restrict dissemination of certain types of sensitive information, which are spelled out in this bill. But I would rely more heavily upon addressing the Freedom of Information Act problem as a separate problem which touches on all agencies.

Mr. MATSUI. Then you are saying that the Freedom of Information Act is constricted somewhat, if you adopt this charter, this proposed charter, as it is written out? Is that correct?

Mr. WEBSTER. I don't think so. I think it is just because there are already provisions in the Freedom of Information Act which provide exemptions to disclosure on matters of COG investigations and things of that kind.

Mr. CIVILETTI. I think that is exactly right, Congressman Matsui. The Freedom of Information Act will stand and continue to stand on its own provisions and its own substance and the proposals with regard to reform or revision of it do apply Government wide and we thought it inappropriate to deal with particular concerns of the Bureau or Department of Justice about the Freedom of Information Act in this charter.

Mr. MATSUI. One other matter, then I will yield, Mr. Chairman.

Mr. CIVILETTI, some weeks ago I saw your performance. I guess it was either on "Meet the Press" or "Issues and Answers". I must say you did a tremendous job. This was right after your appointment.

Mr. CIVILETTI. Thank you.

Mr. MATSUI. You were asked by one of the commentators whether or not you would be willing to have additional language added to the charter that would clarify the issue of Cointelpro. You indicated that, if I recall it correctly, if acceptable language could be properly promulgated you would certainly consider it.

Is that a firm statement on your part, and a commitment, if we can devise some language that would be satisfactory to your Department and members of the committee that might be interested in it?

Mr. CIVILETTI. I think my answer at that time, and it is pretty much the same today, was that the intents, purpose, clear understanding, the choice of language used—this appendix that I now have attached to my testimony—all went to make absolutely clear that the improper Cointelpro activities would not be possible under the charter or any of its provisions through any stretch or twist of any kind and that, therefore, I thought we had dealt firmly, forcefully, cleanly, and clearly with the subject.

We did not mention the name Cointelpro in the statute, in the charter, I guess largely because you hate to immortalize a trigger word, or word that has become a trigger word, in a statutory act which is designed for positive activity, for foundational source of conduct, any more than—not a very good analogy—but any more than in an executive piece of legislation you would want to put in Watergate as the statutory term.

But if the committee in its wisdom and its evaluation and the House and Senate in the review felt that somehow there should be a sentence added that all that has been done was unclear or insufficient and so long as there was not simply an attempt to do branding of some kind, a sentence of clear meaning which was consistent and confirmatory of all that we have done to make sure that the activities were clearly outside and prohibited by all of the other provisions of the charter, we would not tell—at least I would not tell—that that was a crushing blow or was inconsistent with anything in the charter.

I don't feel it is necessary. I think we have done a firm and sound job with regard to it, but we realize that the committee has its own wisdom and the Congress has its own wisdom and if it is along the same line and intent and purpose, I think it would be consistent with what we have tried to do.

Mr. MATSUI. My concern regarding this particular issue has been if we have the open rule or modified open rule on the floor, undoubtedly there will be an amendment offered during the course of the hearings on this and you and we may as well have control of the language rather than have it being drafted on the floor of the House. So I would think that that kind of language, because it has become somewhat a sensitive issue, should be considered by both your Department and us.

Thank you. I will yield.

Mr. EDWARDS. The gentleman from Illinois.

Mr. HYDE. Thank you, Mr. Chairman. I have very carefully read the statement and frankly, I am hard pressed to find something in here that I would characterize as anything but an effort to placate the

ACLU. That may be a very strong term. I probably should use a better one.

You do talk about limitations, restraints. Just a personal comment. I hope all of this self-effacement relative to what we are not going to do and how constrained and restrained we are going to be doesn't indicate a lack of determination to be extremely vigorous in the investigation of crime. I am sure that my statement answers itself. I am sure you will be vigorous. But I am just concerned that the emphasis seems to be on limitations and constraints.

Now, the charter is intended to be a constitution for the FBI. OK, who is going to be the Supreme Court? Who is going to interpret this constitution?

We have seen the Supreme Court find things in the Constitution regularly, that I believe aren't there. They sanction race now as very relevant. It is determinative in employment, busing, things like that.

I am just wondering who is going to interpret this constitution and find things in it that might not be there?

Mr. CIVILETTI. Well, I guess for its interpretation there will be everybody who has an opinion on it, but for responsibility and authority with regard to operations, under the charter, that is clearly lodged in the Director of the FBI.

For policy matters and determinations, and for certain limited approvals, that is lodged in the Attorney General, that authority for interpretation and implementation and carrythrough.

For oversight and review, within the charter and also within the Attorney General guidelines, that will be lodged as it is now in the respective committees of the Congress.

For legal interpretation, or case law development, that will be lodged in the Judiciary, and they will or may be called upon in criminal cases and motions by the defendants, or in other ways, to interpret the charter pursuant to judicial standards, and we have, of course, in the preparation of the charter, borne that in mind.

The Bureau has taken and examined things with enormous care over more than a year. Judge Webster and I have personally reviewed the charter line by line, on many occasions, and its construction and interpretation and we hope that the commentary which we have submitted, or which has been submitted with the bill, will help to insure a firm, clear and unconfusing and unsurprising interpretation of the meaning of the charter by all four of those groups, individuals and groups that I mentioned.

Mr. HYDE. I see. The charter will be interpreted as all statutes are by reference to legislative history, which this committee will carefully develop. I wouldn't be too optimistic that there will be any clear trends emerging from legislative history.

Now, turning to page 6. Specifically, before an investigation can be initiated there must be facts indicating a criminal violation. I am concerned that if another Appalachian conference were to surface, wherever the Mafia leaders in the hemisphere were to converge in some remote resort in the Catskills or the Appalachians or elsewhere, whether you would feel that to be a significant enough occurrence to wiretap or attempt to surveil through electronics?

You refer to it as sensitive investigative techniques. Whether that sort of meeting would be beyond the purview of the charter.

Mr. CIVILETTI. Beyond?

Mr. HYDE. Or within.

Mr. CIVILETTI. Within. I think it would be within, without much difficulty.

Mr. HYDE. Well, the right to peacefully assemble is guaranteed, as we know.

Now, inquiries. Would this be an inquiry or an investigation that the Appalachian conference would trigger?

Mr. CIVILETTI. Assuming the Appalachian conference was a conference of persons, as part of a racketeering enterprise, and that we already had, as we do now have, investigations on a number of racketeering enterprises, it would be part of the surveillance, whichever was permitted by law under the operative facts would be a part of a full investigation and probably a continuing investigation and not an investigation because of facts and circumstances indicating a crime but rather facts of circumstances indicating a continuing criminal enterprise or racketeering enterprise.

Mr. HYDE. In other words, that assumption would be made, if known syndicate leaders or members of the syndicate were to converge in any numbers, that assumption would be made about that particular meeting?

Mr. CIVILETTI. We could not assume it. We would undoubtedly have—I am assuming for purposes of responding to your hypothetical, that we would undoubtedly have information indicating that the meeting was in furtherance of one or more criminal racketeering enterprises and that as a result of our continuing investigation, we would have the lawful authority to investigate that meeting as a part of full investigations underway.

Mr. HYDE. If there were no ongoing investigations, of course, the mere effect of this meeting would not authorize you to surveil it?

Mr. CIVILETTI. If there were no ongoing investigations and if there were no development of facts and circumstances to indicate that either the meeting was for the purpose of crime, or that it was to form or continue a criminal enterprise, then we would have difficulty, as we do now. We can't surveil meetings of people that we may not like or may have some vague suspicion about.

Mr. HYDE. You say moreover in most inquiries it is not necessary to resort to sensitive investigatory techniques. But if it were necessary, you would use those, would you not?

Mr. CIVILETTI. I will have Judge Webster answer that.

The sense of the inquiry is to determine whether there is substance and a rational basis for a full investigation and to do it unobtrusively but to have a capacity to do it, so if you get information which is not substantiated, you are able to follow it to determine whether it has veracity or not, without conducting a full criminal investigation, so that you can reach the point of determining objectively and rationally that there are facts and circumstances indicating criminal conduct or a crime.

Therefore, under almost all situations, if all you have got is a vague allegation or a specific allegation but from a vague source, you would be hard put to meet the standards, for instance of wiretapping or of other kinds of surveillance which require, in most instances, the exhaustion of other forms of investigative techniques and the unavailability of information.

So, my general sense of it would be that it would be a very rare instance, if at all, that you would want to use an electronic technique in a preliminary inquiry.

Mr. HYDE. At the bottom of page 9, you state:

Similarly, it is necessary to continue to investigate racketeering and terrorist groups as long as they retain vitality, even though a particular member, or members may have been apprehended, prosecuted and sent to prison. Thus, enterprise investigations will continue as long as the group continues its criminal enterprise activity.

A lot of terrorist groups have political overtones. Terrorism is a political weapon. I know how sensitive investigation of dissenting groups are, but sometimes you get into the fine line, I should think, between political meetings and conspiracies. The PLO comes to mind. And I do not ask for any response on that because of the sensitivities.

My time is up and the bell has rung. Thank you.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. First I would like to ask the Chair, later on after we have had a chance to go through the bill, will we have an opportunity to have these gentlemen before us once again to go into the details of the bill itself?

Mr. EDWARDS. That is the intention of the Chair, and I am sure the witnesses will be glad to come back. We are going to have a number of other witnesses, and I am sure they will bring up some issues which the Department and the Bureau may want to address.

Mr. CIVILETTI. The Deputy Attorney General intends to appear, as well as other well-informed members of the Department.

Mr. VOLKMER. I have only gone through half of the bill, but at a later time, I would like to ask other questions. Right now I would like to clarify something in my own mind. You did participate in the drafting of the bill; is that correct?

Mr. WEBSTER. If that was a question directed to me, Congressman Volkmer, we most certainly did participate in the drafting, the Attorney General and I together participated in the drafting.

Mr. VOLKMER. The previous Attorney General?

Mr. WEBSTER. That is correct.

Mr. VOLKMER. The gentleman from Illinois alluded to the fact that there are restraints, et cetera. The rationale behind the bill is, (1) is it not, the outcome of what has happened in the past as far as certain abuse that did take place; and (2) the fact that some people in the FBI feel they do need guidelines and statutory authority more than that in order to operate without fear of being sued?

Mr. WEBSTER. That is correct. The purpose is to define the mission of the FBI, to define its jurisdiction, and to address some of the more serious areas of investigative procedures. We view it as a very affirmative stand and welcome the opportunity to have our responsibilities more clearly defined for us.

Mr. VOLKMER. But you also wish to be led in general terms and not get into every specific detail as to actions within the perimeter of the charter.

Mr. WEBSTER. In terms of the investigative procedures, they do not lend themselves to statutory, locked-in-concrete approaches.

Mr. VOLKMER. Thank you very much.

Mr. EDWARDS. The gentleman from Wisconsin.

Mr. SENSENBRENNER. Judge Webster, in your previous appearance before the committee, you indicated it was increasingly difficult for the FBI to recruit informants. We all know this is an important facet of your operation. How do you think this legislation will affect your ability to recruit reliable informants?

Mr. WEBSTER. I do not think it will cause any adverse effect. We do undertake to do certain things here that have been done from time to time on a sporadic basis, such as the use of a name check in each case when we are going to recruit an informant, internal procedures. The advice provided by the charter to be given to informers as to what is expected of them is a procedure currently in effect. I have a concerted effort under way to strengthen and rebuild our informant program within the Bureau, and that is moving ahead under guidelines that are similar to the provisions in this charter. The areas that I mention that give us more problems are the prospect of not being able to preserve the confidentiality of the informants and the information supplied by them. We can address that and protect that if we can. Then I have no doubt we will be able to have a meaningful, useful, and reliable informant program within the FBI.

Mr. SENSENBRENNER. Will the charter actually improve the ability to recruit informants?

Mr. WEBSTER. I do not think so.

Mr. SENSENBRENNER. Some of the critics of the charter say it will prohibit the FBI from moving against terrorist organizations while they are in the planning stage of the act; that there would actually have to be an illegal terrorist act before the FBI could move in.

In other words, there would be no fire prevention; you could only call the fire department after the fire broke out. Do you agree with this contention?

Mr. WEBSTER. No, I do not. The charter clearly provides for investigating organizations planning force and violence as well as those who have committed it.

What we have to have essentially is information that an organization is planning acts of force and violence against the United States, against one of its institutions, or against civil rights, or is engaging in a political result by means of intimidation or coercion. When we have that information we are able to go ahead with the investigation.

Mr. SENSENBRENNER. Finally, it is said that the FBI, that you cannot investigate the activities of the troops, only the leaders. How do you respond to that criticism?

Mr. WEBSTER. The Attorney General has already responded to that by saying we can investigate a subgroup where the subgroup is a core engaged in the conspiratorial aspects which offend the law.

We have considered in the past that certain types of investigations can become necessary where we have the problem of developing informants to gather information about particular groups. One or two such instances have come to mind where the information is so shallow that the mere investigation of one or two top leaders will not put us in a position to—first of all, we have to have the threshold information that warrants an inquiry and an ongoing investigation. After that, I think we should be free to have a broader look at the operations.

We do not have the resources even if we had the inclination to

investigate thousands of individuals who had allegiance to an organization whose core group may be engaged in some kind of terrorist activity.

Mr. SENSENBRENNER. On May 20, the New York Times reported that the American Civil Liberties Union has criticized many of the provisions of this legislation. Mr. Attorney General, have you any insight into this apparent change of position, and if so, what is it?

Mr. CIVILETTI. No.

Mr. SENSENBRENNER. I have no further questions, Mr. Chairman. I yield back the balance of my time.

Mr. EDWARDS. Let us assume, gentlemen, that 10 years hence we have a new Attorney General and a new Director, and we have domestic unrest in this country, and all sorts of things are happening that frighten people as in the past, and the new Attorney General and the new Director just decide to disobey the charter on a wholesale basis. What machinery is in the charter to assure this will not happen and things will be taken care of if it does happen?

Mr. CIVILETTI. The full panoply of the criminal and civil law applies, of course, to every Attorney General and every Director of the FBI, and the particular regulations and rules which govern the Department of Justice employees, govern both the Director and the Attorney General as well as all other professional and ethical codes.

So, in your instance, depending on what particular acts of violence to the charter are committed by the Attorney General of the future, or the Director of the future, they would wind up either discharged, in jail, disbarred, or subject to substantial civil liability, or all four.

Mr. HYDE. We might even censure you.

Mr. VOLKMER. If the chairman will yield.

There is nothing in the charter that can in any way prevent the violating of constitutional rights?

Mr. CIVILETTI. The charter merely strengthens protections that are already existent within the Constitution.

Mr. VOLKMER. There is no limitation within the Constitution.

If a person would do such a thing as has been proposed by the chairman and even though there may not be any civil penalties reflected within the charter, there surely would be actions that people could bring against the Director, agents, or anyone else, within the courts, both for civil damages and for injunctive relief or any type relief if they were violating that charter because of your authority being prescribed by the charter.

Is that correct or incorrect?

Mr. CIVILETTI. I think it is largely correct. It would depend upon the nature of the occurrence. There are some provisions in the charter which call specifically for guidelines with respect to recordkeeping. If there was a mixup in the records, or misfiling, that would be handled of course within the effective disciplinary proceedings within the Department, or depending on who did it.

Mr. WEBSTER. Put in the perspective of history, it was possible in the past to argue that there was an assumed authority derived from the President to protect domestic tranquility. That was one of the arguments. Or simply, the vagueness of statutory authority left the question open and undefined. All of us, the Attorney General, I am, the President, are sworn to uphold the Constitution and the law. If this becomes the law, then there can be no argument as to whether or not we have an obligation to uphold it.

Mr. EDWARDS. I understand that, Mr. Director. I do not quite understand what is in the charter to impose sanctions except a statement that certain things should not be done. I compliment you very much that you emphasize the fact that the criminal standard is being utilized in this charter. But in the event an elaborate Cointel program would start in the future—and we would assume it is not illegal, as many of the Cointel activities were not in the past, and some were not even torts. They were not government at its best, and many people were hurt very badly. What would stop that activity from taking place?

Mr. WEBSTER. There again, the charter does not guarantee that men will not act wrongly. It offers no guarantee that a special agent will not violate that statute or that the Director will not violate it. There are other means at hand to assure the proper people are working within this Department as in other agencies of Government.

I do think you go a long way down the road in any type of charter enunciation, whether it be in the FBI or some other framework of Government, by making it clear what the agency has in the way of jurisdiction and what it does not have.

In those particularly sensitive areas, the procedures it is obligated to follow eliminates the pretense or the excuse that the authority was assumed or was derived from some other place. Because one of the other principles of this charter is that we look to the charter to see if the authority is there. If it is not there, we do not have it.

Mr. EDWARDS. Yes. I accept that answer, Judge Webster.

The public and the Congress will have no way of knowing about any violations of the charter unless someone within the FBI leaks this information to the press or unless a lawsuit is filed. What about the oversight committees and their responsibilities? We will have no way except the two ways that I mentioned, or unless in your wisdom or in the wisdom of whoever is Director, they decide to tell the oversight committee that there are things going on within the FBI that violate the charter. How are we supposed to find out about any violations of the charter?

Mr. WEBSTER. Of course the most important thing I think that the Congress and its designated committees have to do in terms of oversight, as I understand oversight, is to satisfy themselves with respect to the policies and procedures and rules and regulations which we establish internally and which the Attorney General establishes for our guidance, that these are adequate and sufficient to assure compliance by people trying to do their job properly. I do not really think that Congress wants to undertake—and it may be presumptive for me to assume—but wants to take on the policeman's role of trying to identify individual action of dereliction or omission. It is important to make sure we have the machinery at hand and then hold the Director responsible in any way, accountable to come up and talk about those specific cases where there are problems.

Mr. EDWARDS. My time is up. I will briefly comment that we have had experience in asking the Bureau—before your time, of course—asking them for information and not receiving it. There have been a number of inquiries that go back over many, many months with regard to surreptitious entries. Having to read about them in the newspaper in something we do not like to do.

I recognize the gentleman from California, Mr. Matsui.

Mr. MATSUI. If I may pursue the chairman's questioning for a moment. In this proposed charter—this is just by way of hypothetical—if an informant violates a law, then the FBI is to report that matter in writing to the Department of Justice. I was just trying to find the page that happened to be on. It is a small matter, but let's assume that internally the FBI decides that is not necessary to do so. That would in essence be a violation, technical or otherwise, of the charter. If we should find out about it, or if some individuals who were subsequently prosecuted through some investigative activity of this particular informant, what remedies do we have as a congressional body? And second, what does this person who is prosecuted have and what disciplinary action will be taken against the individuals or groups within the FBI who made the judgment to violate the charter?

I guess that is part of the question the chairman was asking. In other words, there is no criminal sanction, so the Department of Justice would not be able to prosecute the individual within the FBI who made the judgment.

Mr. CIVILETTI. Perhaps not. It depends upon the purpose of the wrongful action. It may well be an act of conspiracy of one kind or another to defraud the Government or for some other purpose, so it is not—

Mr. MATSUI. There is nothing within the charter itself?

Mr. CIVILETTI. The charter is not a criminal code. It does not provide a whole new series of crimes or violations.

Mr. MATSUI. What remedy would you suggest if that violation occurred?

Mr. CIVILETTI. It depends on the violation, but there are now three basic remedies, and there will be four with the enactment of the charter. There is the remedy of the civil fine of \$5,000 per incident for violation of the investigative sections, the sensitive sections. Those remedies are the disciplinary actions of the Director now under his powers which he will have under the charter, a disciplinary proceeding. There is a potential for criminal and civil liability, and there is the new civil fine.

The consequence, in the example you indicated, the consequence to the defendant would probably be nonexistent. It would not be a consequence one way or another unless there was a showing of harm or lack of due process or some prejudice to the ultimate defendant in the criminal case as to which the Bureau failed to notify the Department of Justice with regard to the informant's conduct.

As to the informant, in that instance, unless he had some participation in the reason for not reporting over to Justice, then the informant's conduct would be judged independent of the report requirement and based upon how heinous or aggravated his conduct had been. The agent or agents' responsibility would be subject to the four deterrents or punishments which I mentioned.

The added one by the charter specifically would be the additional power to fine in the hands of the Bureau, legislatively given to him which he does not have, I do not believe, given to him now up to \$5,000.

The determination as to the degree to enforce would depend on the harm caused to the system as well as individuals, whether it was a deliberate act, what its purpose was, all the kinds of balancing that you have to determine in any proceeding, in any matter.

Mr. MATSUI. Mr. Civiletti, you mentioned the four items, and all were more or less internal actions that would be taken by the FBI Director, or the people who worked under him.

Mr. CIVILETTI. Only one, the disciplinary proceeding. The criminal and civil proceedings would be taken by third parties.

Mr. MATSUI. Yes, I was going to get to those. You have the internal activities which would occur within the FBI. The criminal activities would be set forth in the charter itself, so there would be an independent statute we would have to look at. The informant in this particular case would be well served not to bring it up, and importantly, the defendant would not be harmed.

So what incentive, except to do a good job for his country, would an individual in that position and with that kind of control, what incentive is there to make these reports and comply with the charter other than the higher duty we talked about?

Mr. CIVILETTI. I guess the loss of his job and his profession and the potential of a \$5,000 fine.

Mr. MATSUI. Do you think that would be proper for all potential criminals, whether they be FBI agents, doctors, lawyers—

Mr. CIVILETTI. You have switched on me from the violation of the charter reporting provision, which is not criminal.

I think in most professions noncriminal conduct which is in violation of the duties of the profession is deterred or punished by the loss of the profession, disgrace, and by civil liability. That is the standard conduct.

If the conduct is against the profession and the rules of conduct required of the profession also amounts to criminal conduct, then the full panoply of criminal law would be utilized.

Mr. MATSUI. Thank you; that is a very good answer.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

On page 14, you are talking about guidelines. Actually this section provides that "To insure that information obtained through the use of sensitive techniques is used by the FBI only for lawful and authorized purposes as set forth in the charter itself."

Does that mean you would not share with the CIA any information obtained through the sensitive techniques if it was appropriate the CIA know about it? What does the underlining, "by the FBI," mean?

Mr. CIVILETTI. It is meant to emphasize dissemination by the Bureau for criminal investigative purposes, a difficult area. The intention and purpose of the collective information provision is as to any dissemination outside the Bureau, the guidelines will have to be very, very specific. We will have to be very certain the dissemination is lawful, meets the same standards of certainty, of intent, which is the basic reason for the collection of the information and the investigation; and that we consider, the Bureau considers, the security and the retention of the potentially damaging information as carefully and as importantly as they consider the positive duty of collecting and depositing the information.

Mr. HYDE. Suppose it is the main purpose of the investigation but through inadvertence or fortuitous circumstance such as an X-ray, you find additional information which has nothing to do with the main investigation, but it has intelligence importance? The question is, Are we going to be adversaries, or can we share these things with other agencies of the Government?

Mr. CIVILETTI. Certainly we have to coordinate; certainly there has to be both back and forth between the CIA, the FBI, and other investigative agencies, a certain amount of exchange of information. But you have to be extremely careful in working out, pursuant to the law, the information which is being exchanged, what its purpose is, how it was obtained and collected, so that you are not inadvertently, out of a sense of cooperation or efficiency, perverting or corrupting the fact that the CIA's main duty is foreign intelligence, and they have no charter, no responsibility, and no duty performance, no mission to investigate criminal acts in the United States.

We do not want by looseness in the exchange of information to have any misunderstanding that somehow the CIA is investigating for criminal materials or criminal information and conducting its business, and vice versa. The FBI has no mission, no duty or responsibility for conducting investigations outside the United States for intelligence purposes or for criminal purposes.

Those kinds of basic principles are ones that we have to be careful of, because the standards, for example, under the Foreign Counter-intelligence Act are not exactly the same as the standards which are provided for under title III of present law for criminal electronic surveillance. It would be wrongful to be mixing the information collected from those two separately designated and separately performed duties in one pot.

Mr. HYDE. Please forgive me, but I have not been in sympathy with the abhorrence expressed by some people when others are cooperating with the CIA. My God, imagine working with that despicable agency of government.

Now the FBI is going to turn up an awful lot of information, and I hate to see an adversarial relationship between the FBI and the Foundation for Disease Control, et cetera, if we are to feel so guilty about cooperating. It seems to me we could work together, because the taxpayers are paying for all this freight and intelligent people such as yourself, Judge Webster, Ed Turner, ought to be able to sit around the table and do this without it being too burdensome, just because somebody does not want the IRS to know they have money stashed in Mexico City.

I wanted to express my misgivings.

Mr. WEBSTER. You have to be careful what agencies you are talking about. If you are talking about the CIA and we develop in the course of an investigation information having to do with its inquiries, as I understand the charter, that intelligence information will be transmitted under an intelligence charter. But if—which is probably closer to your question—if we were examining under electronic surveillance, conducting a criminal investigation of organized groups, and we overheard a plot was underfoot to assassinate the President of the United States, certainly we would communicate that to the Secret Service, and there is nothing in the charter to prevent that.

Mr. HYDE. On page 17: "In addition to all this, before an informant may infiltrate a terrorist group"—incidentally, I am glad we are going to have a higher class of informants. Maybe we could even have a graduation exercise at Quantico. I have always liked the dumb informant—"the group itself must be properly under investigation for violent crimes and the infiltration must have been found necessary under the circumstances in a written finding by a supervisory official."

One of the great embarrassments of the Bureau was the Patricia Hearst disappearance and its inability to get a line on Patricia Hearst. The failing was not having informants in the movement. I can foresee the harboring of terrorists by groups who might be part of a railroad organization. Under this charter, you cannot get a line as to where this disappearing bombtossers is.

Mr. CIVILETTI. In your hypothetical, I think we would be very close to a criminal enterprise which was aiding and abetting or assisting in terrorist activity, even though they were not themselves participating. If they were an underground railroad for the harboring of violent terrorists, I think under the charter provisions, depending on a reasonable showing of facts, we would be able to take action.

On the other hand, if there is a group which is, say, religious-political in nature, and there are no facts or circumstances to indicate that the group is engaged in or has intention of committing violent activities, but one of its members in another community goes and throws a bomb and he or she then goes back to the group and obtains some assistance of some nature, we would not, in all probability, be able to undertake an enterprise investigation of the group, but we would have the full power of the law to investigate, as we do now, individuals who participated with him or were suspected or there were reasonable facts that indicate participation with the criminal in harboring him, aiding or abetting him in some way. We are not powerless, but at the same time, unless there is a greater showing of infiltration, the participation of the group, it cannot be done.

Mr. HYDE. Jonestown would present all kinds of problems in that sense.

Mr. CIVILETTI. Yes; and it presents other problems. If you switched Jonestown back to the United States and you remove all the additional problems of the foreign country, then it would become a question as to the threshold of the investigation. I think had those initial activities occurred in the United States, we would have been able to monitor, in one manner or another, the Jonestown disaster. As we got closer to their tragedy and programs, we would have been able to prevent it.

Mr. HYDE. But not infiltrate, because they had not committed any violent crimes as yet?

Mr. CIVILETTI. I am not sure some of the precipitatory activity within the community itself as well as outside may not have been violent crimes.

Mr. HYDE. Thank you.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. You have addressed the gentleman from Wisconsin's question on terrorist activities. But reading the definition as it appears in the bill as to terrorist activities, there is a question which arises in my mind whether planning is sufficiently within the language of the bill, or whether there has to have been actually the violent act occur? I believe on page 7 it says terrorist activity involves violent actions.

Does the word "involve" and the word "activity" mean discussing a violent act, in your opinion?

Mr. WEBSTER. I think you will find that is a definition of terrorist activities, but the investigative authority on page 11 permits us to conduct an investigation for the purpose of—

I equate "for the purpose of," in a conspiratorial sense, even though the acts have not occurred.

Mr. VOLKMER. Also, on page 11, small 1, small 2, down at the bottom. That is an "or" between 1 and 2?

Mr. WEBSTER. Yes.

Mr. VOLKMER. With that assurance, you are satisfied then, of your interpretation?

Mr. WEBSTER. Yes; I am.

Mr. VOLKMER. The other thing that was discussed earlier by the chairman and the other gentleman from California is as to enforcement of the charter. Then you get into what would be enforcement. I go through here and I find there are certain duties and responsibilities of the supervisory personnel of the Director, as to when notice is to be given for investigation, demands, things like that, and surely I am hoping they are not saying that if for one reason or another there is a slipup, that the person should be subject to a criminal penalty. I hope nobody is contemplating action such as that. I know you are not, I hope members of this committee are not. That would be subject to a crime or would be responsible in a civil proceeding for damages?

Mr. WEBSTER. I would like to think there is no special kind of criminal law reserved just for special agents of the FBI.

Mr. VOLKMER. The other thing that I would like to ask, let us take a hypothetical. Suppose we had an investigative man taking records and those records become a necessary ingredient in a criminal case. Assuming notice was not given, and the defendant knew he had not been given notice, then found out the written little thing that had to be made. Could he prevent that evidence from being used?

Mr. CIVILETTI. No; the exclusionary rule is not incorporated within the charter specifically. There is a provision in the charter that it shall not have such effect.

Mr. VOLKMER. If for some reason or other there was a slipup in utilization of informants, the information could still be used?

Mr. CIVILETTI. Yes, sir.

Mr. VOLKMER. I yield back the balance of my time to the chairman.

Mr. EDWARDS. I yield to Mr. Sensenbrenner.

Mr. SENSENBRENNER. I would like to follow up on questions by Mr. Hyde as to dissemination of information which might be obtained by the FBI. I have reviewed this and I am satisfied that FBI-generated information can be given to either another State or local law enforcement agency or a foreign law enforcement agency. I see nothing however as to dissemination of FBI-generated material to a friendly foreign country. So if the FBI should get information which would fall within the jurisdiction of a foreign intelligence agency, that information could not be legally disseminated to that foreign intelligence agency.

Have I read this correctly or not?

Mr. CIVILETTI. You have read it so far as it goes correctly, but where the misreading occurs is in the charter. We do not cover the dissemination. It is covered in the intelligence charter which is still under review and which will cover the permissible or impermissible dissemination to foreign intelligence agencies as the charter does to law enforcement agencies.

Mr. SENSENBRENNER. What if there is a hiatus between the passage of this charter and the second charter? What do we do in the interim?

Mr. CIVILETTI. We would be covered by the same law now in respect to the executive order, general provisions, things of that kind; and this charter does not deal with that specific subject.

Mr. SENSENBRENNER. Thank you. I have no further questions. I yield back the balance of my time.

Mr. EDWARDS. With regard to the question by Mr. Volkmer, an investigative demand, there is quite a difference between investigative demand as established in the charter and investigative demand of the Financial Privacy Act, is there not? It has to do with delay of notice requirement. In the Financial Privacy Act the delay of notice is requested of a magistrate or judge, and the delay as to the charter is asked of the Attorney General. So it is an internal matter rather than any responsibility of the judicial system.

Mr. CIVILETTI. There is a difference, that is correct—it is arguable which is more restrictive.

Mr. EDWARDS. Arguable?

Mr. CIVILETTI. Whether the Attorney General is going to be more careful and more detailed or a magistrate will be more careful and detailed.

Mr. EDWARDS. I suppose it all depends on the Attorney General and the magistrate.

Mr. CIVILETTI. There is only one Attorney General, but there are hundreds of magistrates.

Mr. EDWARDS. Are we going to single out the FBI for a statutory control system and leave all the other agencies subject to control by an internal mechanism? Mr. Attorney General, do you believe this charter should be a model for all the other agencies?

Mr. CIVILETTI. I think it can be. I have not closely examined the problems which exist or may exist in the other agencies. Generally their jurisdiction is more limited, DEA, ATF, Postal Inspection Service—the scope of their duties is not as onerous as the FBI. So even though it could be a model, it would be a more narrow model. The need within the FBI is greater, and that is why we feel so strongly about this charter at this time for this agency.

Mr. EDWARDS. Insofar as terrorist activity is concerned as defined in this bill, this kind of activity appears also to be included in activities that are violations of State, local, and foreign law. Is there any conflict with basic concepts of federalism in making local, State criminal acts automatically subject to Federal intervention?

Mr. CIVILETTI. No. That is a very narrow catch provision with regard to terrorist activities to allow the expertise, knowledge, information developed by the Bureau as it exists now and as it will exist in the future to be applied in a circumstance where a Governor within a State or a judge is being threatened by a foreign terrorist organization or by a local terrorist group, and it does not affect or give rise to Federal jurisdiction. You could imagine such circumstances wherein you and I both and the public generally would say if a Governor or prominent judge was being threatened with being blown up or threatened to be assassinated by a terrorist group motivated against that judge's ideas, certainly the FBI should be able to exercise its judgment as to entering that investigation. So, it is a very narrow area and there is no intention or desire whatever to transgress the ordinary principles which we believe very strongly and the Bureau believes very strongly and resist our dual federalism concept.

Mr. VOLKMER. Will the chairman yield on that question?

Mr. EDWARDS. Yes.

Mr. VOLKMER. Assume it is within a small unit and two or three people decide the mayor has acted wrongly and plan violent threats and say "We are going to bomb your office," or what have you. Now, would you automatically go into that, or only upon request?

Mr. CIVILETTI. No; we would not automatically go in, and under this circumstance it is my belief an assessment would be made by the FBI and by the Director as to need, necessity, level of risk, and the rest, before there would be an investigation.

Mr. VOLKMER. If the same thing occurred in the city of Chicago and Los Angeles, say it is against the mayor and all the councilmen, then a couple of them get all blown up or get their cars blown up, then you would look at it more seriously?

Mr. CIVILETTI. No; the assessment would be looked at on, is it really terrorism, what is the capacity for the local police force to deal with it, what is the level of risk. Whether it is the mayor of Peekskill, N.Y., or the mayor of Los Angeles, it would not make any difference.

Mr. VOLKMER. Thank you, Mr. Chairman.

Mr. EDWARDS. Getting back to the new jurisdiction on terrorism—and I do not think it is bad, it is a very important subject—but even so, Mr. Attorney General, you are given investigatory jurisdiction over certain State crimes, but there is no Federal jurisdiction there except to assist the local police; is that correct? Should there be some Federal law in this other than what you are establishing in the charter?

Mr. CIVILETTI. I do not think so.

Mr. EDWARDS. We will have a series of votes on the floor now. Are there further questions? The witnesses have kindly consented to coming back at a later time.

Thank you very much for very valuable testimony. We are very pleased to have you here today. You have our assurance we will move ahead as expeditiously as possible.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned, to reconvene upon the call of the Chair.]

# LEGISLATIVE CHARTER FOR THE FBI

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WEDNESDAY, SEPTEMBER 12, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, at 9:30 a.m., in room 2237, of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Volkmer, Hyde, and Sensenbrenner.

Staff present: Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today's hearing marks the second of the subcommittee's hearings on H.R. 5030, the proposed charter legislation for the FBI.

Last week we heard from the Attorney General and the Director of the FBI who are primarily responsible for drafting the charter. In the future we will be hearing from other Federal officials, law professors, and outside groups who have agreed to study the charter, comment on it, and help us through the legislative process.

But today we have a unique opportunity to hear from a group of people who have already been through this process and have achieved the goal we are looking toward here.

In July of this year, the City Council of Seattle, Wash., enacted Seattle city ordinance 108333, commonly called the Seattle police intelligence ordinance, designed to define the responsibilities of the Seattle Police Department.

Each of our three witnesses participated in the drafting of the ordinance. They were involved in long hours of negotiation aimed at achieving a balance between the needs of effective law enforcement and the constitutional rights of Seattle citizens.

Although I suspect each of the witnesses will agree that the ordinance is not perfect, the city council decided it was time to enact the ordinance and evaluate it on the basis of actual experience.

We have invited them here to comment on the process they went through in drafting the ordinance, to discuss the primary issues and controversies that arose, and to explain how those controversies were resolved.

The drafting committee members included police officers, both city and county prosecutors, representatives from the mayor's office, and outside groups. While we cannot have all of those groups here to testify, I believe our three witnesses will reflect several different points of view.

Our first witness is City Councilman Randy Revelle. Mr. Revelle is vice chairman of the Public Safety and Justice Committee of the council, and as such was the primary sponsor of the ordinance in the city council. Mr. Revelle was instrumental in the development and enactment of the ordinance. He is a lawyer and—for those of you who are interested—a Democrat.

Our second witness is Paul Bernstein, from the city attorney's office. Mr. Bernstein is director of the criminal division of that office. Prior to this appointment, Mr. Bernstein spent 6½ years as a trial attorney with the King County prosecutor's office.

Our third witness is Kathleen Taylor, coordinator of the Coalition on Government Spying. The coalition is an alliance of the Seattle affiliates of the ACLU, the American Friends Service Committee, and the National Lawyers Guild. The coalition has received endorsements from dozens of political, labor and religious groups in Seattle in calling for legislation in this area.

We are fortunate to have all of you with us today.

I have asked each of the three witnesses to briefly summarize their prepared testimony and then we will be able to ask questions of all of them.

We are honored today by having our colleague from the Seventh District of Washington, the Honorable Mike Lowry, a most distinguished Member of the House, and a good friend of all of us here, to appear to introduce and greet our friends from Washington.

Proceed as you see fit, Michael. We are delighted to have you here. Thank you very much, and you are recognized.

Mr. LOWRY. Thank you, Mr. Chairman, members of the committee.

Congratulations to the committee, and thank you for taking up and pursuing this very important legislation for the protection of the civil rights and the civil liberties of our citizens, as well as having the proper law enforcement to handle those criminal activities that are also definitely in the best interest of our citizens.

In Seattle we have had experience, as you mentioned, Mr. Chairman, that I think will be of great aid as you pursue this objective that we can apply our experiences there to aid in the development of this very important matter.

Who we have today is Councilman Randy Revelle, from the city of Seattle, who has been on the city council, working innumerable hours for 6 years, and who was chairman and vice chairman of the committee that developed the Seattle ordinance that was passed this past July, and Randy was by far the person most active on the city council in developing that ordinance and his experience, I think, will be invaluable.

Along with Randy we have Kathleen Taylor, who is the coordinator of the Coalition on Government Spying, which in Seattle is a coalition of interested groups that have gone together to aid in the drafting of this police ordinance, and her experience and the experience of those organizations will prove to be very, very important to the committee.

And we have Paul Bernstein, who is the director of the criminal division of the city attorney's office in the city of Seattle, a separately elected office, who worked to provide the legal expertise and the legal background and the drafting background for this ordinance.

So I think that we have here three people who worked very hard for our community, and with this experience is really going to aid the

development of this ordinance, and so it's my pleasure—are you going to lead off, Randy?

Councilman Randy Revelle.

Mr. EDWARDS. Thank you very much. I appreciate your coming here today, Mr. Revelle, and you are recognized.

Without objection, all three statements will be made a part of the record, and you may proceed as you see fit.

### **TESTIMONY OF RANDY REVELLE, COUNCILMAN, CITY OF SEATTLE**

Mr. REVELLE. Thank you, Mr. Chairman and members of the Subcommittee on Civil and Constitutional Rights, for this opportunity to discuss the history and substance of Seattle's police intelligence ordinance.

The development of a charter for the Federal Bureau of Investigation is among the most important legislative issues facing Congress. In developing a charter for the Bureau, your subcommittee must establish a workable and equitable balance between protecting civil rights and promoting effective law enforcement. That is a very delicate and difficult balance to legislate.

After several years of effort, on July 2, 1979, the Seattle City Council unanimously enacted Seattle's police intelligence ordinance. In my opinion, the Seattle ordinance will help protect our most cherished civil rights and liberties, while enabling the Seattle Police Department to conduct effective investigations into criminal and other unlawful activity.

The ordinance, as far as I know, is the first of its kind in the Nation. It should be a model for the many other jurisdictions considering the enactment of similar legislation. I hope our experience in developing and enacting the ordinance will provide helpful guidance as you struggle to develop a charter for the Federal Bureau of Investigation.

In October 1974, during stormy city council hearings on the confirmation of the mayor's nominee for police chief, the city council learned that the nominee had discovered and destroyed about 100 unnecessary intelligence files when he was serving as interim chief. The names of the persons and organizations on whom the Seattle Police Department had collected information were not made public at that time. A few articles appeared in the local press in response to the nominee's disclosure, but nothing of substance was revealed about the police intelligence files or activities.

A year later, in November 1975, members of the fourth estate, the news media, published a list of about 150 prominent persons on whom the Seattle Police Department allegedly had kept intelligence files. The media also revealed the existence of about 600 similar files in the police department.

The fact that the department apparently had been gathering information on numerous persons without good reason quickly became a volatile public issue.

During our review of the police department's budget, the city council unanimously agreed that legislation should be prepared to establish policies and procedures governing police intelligence operations.

We then began about a 3½-year effort which culminated in the enactment of legislation this last July 2. The story of that effort is set forth on pages 2, 3, and 4 of my testimony. In the interest of leaving

plenty of time for questions, I will let you read that, rather than go through it at this time.

Going instead to the substance of what the ordinance does, the Seattle police intelligence ordinance is relatively long and complex for a city ordinance because it governs a complex and sensitive subject and applies to all Seattle Police Department personnel and their investigative work. I will briefly describe the major substantive provisions of the ordinance and then after the other speakers have testified, answer any questions you may have, or at least try to do so.

Perhaps the most important provisions of the Seattle police intelligence ordinance are in the first two sections containing a statement of the purpose and policies of the legislation. The stated purpose of the ordinance is to permit Seattle Police Department personnel to investigate and collect information on a person only so long as the investigation does not unreasonably infringe upon that person's right to privacy and constitutionally protected rights. Most of the 7,000-word ordinance is devoted to defining what is meant by the phrase "unreasonably infringe upon that person's rights."

The ordinance establishes policies requiring equal enforcement of the law, permitting the collection of information only if it is relevant to criminal investigations or other legitimate police functions, such as protecting dignitaries, requiring periodic review of Seattle Police Department files, establishing standards for disclosure of information to other police agencies or individuals in order to protect a person's right to privacy, and directing the department to use investigative techniques that have the least adverse impact upon lawful political or religious activity.

A basic provision in the ordinance relates to authorizations and limitations on collecting information. Seattle police officers are permitted to collect restricted information—that is, information dealing with a person's political or religious associations, beliefs, activities, or opinions—only if the police officer obtains permission from a superior by securing what is called an authorization.

An authorization can be granted if there is a reasonable suspicion that the subject of the investigation is involved with criminal activity as a principal, a witness, or a victim; the restricted information is relevant to the investigation of the criminal activity; and the collection of the restricted information is consistent with the policies and other provisions of the ordinance.

Detailed information must be supplied in writing to justify an authorization. That's listed on page 6 of my testimony. It's important to note that this information is required only if a police officer begins to investigate a person's political or religious associations, beliefs, activities, or opinions.

There are similar provisions that relate to protecting visiting officials and dignitaries, and also to handling private sexual information. Those are set forth on page 7 of my testimony.

The ordinance also governs a number of other police operations. Two of them I would like to cite.

The Seattle police intelligence ordinance prohibits the use of infiltrators posing or acting or members of a religious or political organization, unless the infiltrator is justified as part of an authorization for a criminal investigation or special authorization for dignitary protection. In addition, the chief of police must certify that the infiltrator is necessary to the investigation.

Informants must be given special instructions not to use unlawful techniques to obtain information or to participate in unlawful acts of violence. They are to be directed to avoid initiating a plan to commit criminal acts, and must not participate in criminal activity unless specifically authorized by the Seattle Police Department as necessary to obtain information for prosecution.

On pages 9 and 10, I describe the functions of the criminal intelligence section. Many advocated throughout the process that we should not only provide an ordinance that sets forth limitations and controls on police intelligence, but affirmatively sets forth what the police intelligence unit is supposed to do. Interestingly enough, that advice came from members of the police intelligence unit.

There are two elements of the ordinance you have indicated are of particular interest to the committee, and we feel they are particularly important to the effective implementation and enforcement of the ordinance. That is the auditor and civil liability.

The basic enforcement mechanism of the Seattle police intelligence ordinance is an independent auditor. The auditor is nominated by the mayor and confirmed by the nine members of the Seattle City Council. There are seven qualifications the auditor must meet, which are set forth on pages 10 and 11 of my testimony.

The auditor may be removed from office by the mayor for cause upon filing a statement of the mayor's reasons for the removal with the city council. The qualifications required of the auditor and the checks and balances between the mayor and city council are intended to enhance the independence, integrity, and effectiveness of the auditor.

Under the ordinance, the auditor has access to all police files and records except personnel files, internal investigation files, and special investigations which the King County prosecutor certifies must be withheld from the auditor's review.

The prosecutor is authorized to withhold information from the auditor that includes investigations of government corruption, investigations of organized criminal activity, or potential conflicts of interest for the auditor. In those special investigations, the prosecutor in effect acts as the auditor and certifies compliance with the ordinance. The auditor must keep all police files and records confidential, and the auditor must audit all police files at least twice a year.

If the auditor has a reasonable belief that restricted information has been collected in a manner substantially violating the ordinance, the auditor must notify by certified mail any person about whom the restricted information has been collected.

The Seattle police intelligence ordinance also creates a civil cause of action against the city of Seattle if police officers: (1) collect private sexual information in violation of the ordinance; (2) collect restricted information in violation of the ordinance if the police officer knew that no authorization could validly have been granted; (3) use an infiltrator to collect restricted information in a political or religious organization when there is no reasonable suspicion of criminal activity; (4) incite another person to commit unlawful violent activity; or (5) communicate information known to be false or derogatory with the intent to disrupt lawful political or religious activities.

The city of Seattle must pay actual damages incurred by persons whose rights have been violated. Since actual damages are difficult to assess when violations of a person's civil rights are involved, a

person may elect to seek liquidated damages between \$500 and \$1,000 for various violations of the ordinance.

With an independent auditor notifying persons whom the auditor suspects have been wrongfully investigated and with the civil liability of the city, the ordinance creates an effective mechanism for citizen enforcement. In addition, the chief of police has significant enforcement responsibilities.

Because of the complexity and pioneering nature of the Seattle police intelligence ordinance, we anticipate encountering unexpected problems while implementing the new ordinance. Therefore, the mayor and city council have committed themselves to reviewing and, where appropriate, revising the ordinance within 18 months after its effective date. The effective date of the ordinance will be January 1, 1980.

Seattle is proud to be the first local jurisdiction in the United States to enact reasonable and effective legislation governing police intelligence operations. Concerned citizens and dedicated public officials devoted hundreds, perhaps thousands, of hours trying to strike the elusive balance between protecting civil rights and promoting effective law enforcement.

The ordinance received unusual editorial support from both of Seattle's daily newspapers, a rare occurrence.

More important, the ordinance received the unanimous support of the city council, which is rare for complex and controversial legislation.

What we have learned from Seattle's experience in developing the ordinance can be summarized very simply. First, developing legislation that strikes an equitable and workable balance between civil rights and law enforcement requires a monumental effort and inspiration from a wide variety of concerned citizens and public officials. It's an enormous job.

Second, police officers need clear, understandable, and workable guidelines to carry out their law enforcement duties. They are already overburdened with reams of paperwork and sophisticated legal distinctions. Each new reporting requirement under the ordinance was thoroughly considered in light of these concerns.

Third, citizens need a credible enforcement mechanism in legislation governing police conduct. Otherwise, there's no confidence in it. An independent auditor and civil liability for violations of the ordinance provide credible channels for citizen involvement in enforcing the law.

Finally, as was pointed out by the chairman, no legislation attempting to strike a balance between civil rights and law enforcement is going to be perfect. No member of the city council or the drafting committee thinks the ordinance is perfect. Representatives from the Coalition on Government Spying would like additional safeguards in the ordinance. The Seattle Police Department feels that some areas are more strict than they ought to be.

On the whole, however, the drafting committee members support the ordinance as a just and workable balance of civil rights and law enforcement. More important, the mayor and nine members of the city council support the ordinance.

The critical balance between civil rights and law enforcement can and should be established for our police agencies by elected public officials. Elected officials should not wait for a scandal of abuses to seek this difficult balance. Police intelligence legislation was not

needed in Seattle primarily because our police were abusing civil rights but because the police were zealously performing their duty as they saw it.

As Justice Brandeis warned:

Experience should teach us to be the most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberties by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.

I appreciate the opportunity to discuss Seattle's police intelligence ordinance. If you have any questions, I will do my best to answer them at the appropriate time.

[The complete statement follows:]

**TESTIMONY BY RANDY REVELLE, SEATTLE CITY COUNCILMAN, ON SEATTLE'S  
POLICE INTELLIGENCE ORDINANCE**

**INTRODUCTION**

Thank you, Mr. Chairman and Members of the Subcommittee on Civil and Constitutional Rights, for this opportunity to discuss the history and substance of Seattle's Police Intelligence Ordinance. The development of a charter for the Federal Bureau of Investigation is among the most important legislative issues facing Congress. In developing a charter for the Bureau, your Subcommittee must establish a workable and equitable balance between protecting civil rights and promoting effective law enforcement. That is a very delicate and difficult balance to legislate.

After several years of effort, on July 2, 1979 the Seattle City Council unanimously enacted Seattle's Police Intelligence Ordinance. In my opinion, the Seattle ordinance will help protect our most cherished civil rights and liberties, while enabling the Seattle Police Department to conduct effective investigations into criminal and unlawful activity. The ordinance, as far as I know, is the first of its kind in the nation. It should be a model for the many other jurisdictions considering the enactment of similar legislation. I hope our experience in developing and enacting the ordinance will provide helpful guidance as you struggle to develop a charter for the Federal Bureau of Investigation.

**BRIEF HISTORY OF THE ORDINANCE**

Before discussing the substantive provisions of Seattle's Police Intelligence Ordinance, the five-year history of the ordinance deserves some explanation.

*Phase I—An emerging problem*

In October, 1974, during stormy City Council hearings on the confirmation of the Mayor's nominee for Police Chief, the City Council learned that the nominee had discovered and destroyed about 100 unnecessary intelligence files when he was serving as interim Chief. The names of the persons and organizations on whom the Seattle Police Department had collected information were not made public at that time. A few articles appeared in the local press in response to the nominee's disclosure, but nothing of substance was revealed about the police intelligence files or activities.

A year later, in November, 1975, members of the fourth estate news media published a list of about 150 prominent persons on whom the Seattle Police Department allegedly had kept intelligence files. The media also revealed the existence of about 600 similar files in the Police Department. The fact that the Department apparently had been gathering information on numerous persons without good reason quickly became a volatile public issue. During our review of the Police Department's budget, the City Council unanimously agreed that legislation should be prepared to establish policies and procedures governing police intelligence operations. The City Council asked Mayor Wes Uhlman to recommend police intelligence legislation for the City Council's review.

Almost a year later, in October, 1976, the City Council received Mayor Uhlman's recommendations on police intelligence legislation, based in large part on the work of a "Blue Ribbon Committee" appointed by the Chief of Police.

### *Phase II—Fact finding*

With the Mayor's recommendations in hand, the City Council held a public hearing on police intelligence. Almost 400 interested citizens attended the February, 1977 public hearing to express their concerns about police intelligence. In July, 1977, the City Council organized a panel of national and local experts on police intelligence who publicly briefed the Council members on police intelligence issues, problems, and opportunities.

In January, 1978, the City Council held a public panel discussion with past and present commanders of the Seattle Police Department's Criminal Intelligence Section, testifying under oath. The session explored past and present policies, procedures, and operations of the Section. By February, 1978, the City Council concluded Phase II of the legislative process—an open, formal, and public fact-finding effort focusing on police intelligence policies, procedures, and functions, as well as exploring possible methods for controlling potential abuses from police intelligence operations. During Phase II, the City Council wisely decided not to conduct an investigation of old intelligence files or past abuses. Instead, we focused our attention on how to minimize future potential abuses of police intelligence.

### *Phase III—Drafting legislation*

Beginning in April, 1978, the City Council's Public Safety and Justice (PS&J) Committee began a series of public meetings to discuss police intelligence issues and give legislative guidance to a Police Intelligence Drafting Committee created in June, 1978. The Drafting Committee included representatives of the Mayor, City Attorney, King County Prosecutor, the Law and Justice Planning Division of the Office of Policy Planning, the Seattle Police Department, the Coalition on Government Spying (the American Civil Liberties Union, the American Friends Service Committee, and the National Lawyers Guild), and the National American Civil Liberties Union. The Chairman of the Drafting Committee was my Legislative Assistant.

Twelve PS&J Committee meetings were held to give the Drafting Committee guidance for preparing police intelligence legislation. Two proposed ordinances—submitted by Mayor Royer and the Coalition on Government Spying—were used as a point of departure by the Committee. After about ten long Drafting Committee sessions, in November, 1978 draft legislation was widely circulated for review and comment by the many individuals and organizations following the police intelligence issue. The comments received by the City Council were reviewed by the Drafting Committee and selectively integrated into the legislation. If the comments raised serious policy questions, they were discussed and resolved by the PS&J Committee members in a public session. After many more redrafts and long working sessions of the Drafting Committee and me, the Mayor and City Council unanimously enacted the Seattle Police Intelligence Ordinance on July 2, 1979.

### *Reflections on the legislative process*

Preparing comprehensive police intelligence legislation that balances civil rights and law enforcement took hundreds of hours of collective effort by the City Council and the Drafting Committee. More than 50 diverse community organizations monitored and commented on the legislation. Tensions often ran high. While we were drafting the legislation, the Coalition on Government Spying was suing the Seattle Police Department for release of intelligence information. We successfully ignored the battle in the courts as we sat down together to draft police intelligence legislation.

In almost six years as a City Councilman, I have never worked with a group of citizens who have been so conscientious and so willing to work hard and listen to other viewpoints in order to participate in the constructive development of complex and controversial legislation. The citizen commitment to public service was matched by the public servants on the Drafting Committee who spent hundreds of hours working late into the night to draft the police intelligence legislation. I was also very impressed by the ability of agencies with conflicting interests—such as the Seattle Police Department and the Coalition on Government Spying—to resolve their differences in order to produce an effective ordinance, rather than simply scream at each other in the local media.

### WHAT DOES THE ORDINANCE DO?

The Seattle Police Intelligence Ordinance is relatively long and complex for a City ordinance because it governs a complex and sensitive subject and applies to all Seattle Police Department personnel and their investigative work. I will

briefly described the major substantive provisions of the ordinance and then answer any questions you may have, after the other speakers have, or at least try to testified.

### *Purpose and policies*

Perhaps the most important provisions of the Seattle Police Intelligence Ordinance are in the first two sections containing a statement of the purpose and policies of the legislation. The stated purpose of the ordinance is to permit Seattle Police Department personnel to investigate and collect information on a person only so long as the investigation does not unreasonably infringe upon that person's right to privacy and constitutionally protected rights. Most of the 7,000-word ordinance is devoted to defining what is meant by the phrase, "unreasonably infringe upon that person's rights."

The ordinance establishes policies requiring equal enforcement of the law, permitting the collection of information only if it is relevant to criminal investigations or other legitimate police functions, such as protecting dignitaries requiring periodic review of Seattle Police Department files, establishing standards for disclosure of information to other police agencies or individuals in order to protect a person's right to privacy, and directing the Department to use investigative techniques that have the least adverse impact upon lawful political or religious activity.

### *Limitations on collecting information*

Seattle police officers are permitted to collect restricted information—that is, information dealing with a person's political or religious associations, beliefs, activities, or opinions—only if the police officer obtains permission from a superior by securing what is called an authorization. An authorization can be granted if there is a reasonable suspicion that the subject of the investigation is involved with criminal activity as a principal, a witness, or a victim; the restricted information is relevant to the investigation of the criminal activity; and the collection of the restricted information is consistent with the policies and other provisions of the ordinance.

Detailed information must be supplied in writing to justify an authorization. The information must include: (1) the identity of the subject being investigated; (2) the suspected violation of law under investigation; (3) an explanation of the restricted information and its relevancy to the violation of law; (4) a statement of the facts and circumstances creating a reasonable suspicion that the subject was involved in criminal activity; (5) an explanation of the protective measures taken to avoid unreasonable infringement upon the constitutional rights of the suspect; and (6) if an informant or infiltrator will be used, why the use of the informant or infiltrator is necessary. This information is required only if a police officer begins to investigate a person's political or religious associations, beliefs, activities, or opinions.

An authorization to investigate and collect restricted information on a person is effective for ninety days. Additional authorizations may be granted by the Chief of Police for ninety-day periods as necessary to complete an investigation.

Restricted information collected by Seattle police officers or received by them from other criminal justice agencies must have an authorization accompanying the information. Seattle police officers cannot transmit restricted information to another government agency unless the agency submits facts sufficient to obtain an authorization under the ordinance. Logs must be kept of each written transmission sending restricted information to other police agencies.

Special provisions are established under the ordinance for collecting information to protect visiting officials and dignitaries. Restricted information may be collected to protect a visiting official or dignitary if police officers either have a standard authorization, or collect the information from public documents and public sources, or obtain a special authorization for dignitary protection. A special authorization can be granted by the Chief of Police if there is a reasonable suspicion that the subject of an investigation poses a threat to the life or safety of a visiting official or dignitary.

In addition, Seattle police officers may serve on dignitary protection task forces with other agencies for up to ten days prior to a dignitary's visit. Relevant restricted information can be exchanged freely during task force operations. Logs must be kept of all restricted information exchanged during dignitary protection task force operations.

### *Handling private sexual information*

Under the Seattle Police Intelligence Ordinance, Seattle police officers are prohibited from collecting private sexual information unless the information is relevant to the investigation of an observed sex crime, or the information concerns a felony where the motivation for the crime may be sexual in origin, or the violation of law is related to sexual activity, or the information is about a fugitive that may reasonably lead to the fugitive's arrest. Private sexual information or restricted information received by Seattle police officers from other police agencies must be purged within a short time unless the information could have been collected by Seattle police officers under the authorization procedures described above.

Generally, private sexual information cannot be transmitted to another law enforcement agency unless the agency can show it needs the information under circumstances that would have permitted a Seattle police officer to collect the information.

### *Limitations on other police operations*

The Seattle Intelligence Ordinance prohibits the use of infiltrators posing or acting as members of political or religious organizations, unless the infiltrator is justified as part of an authorization for a criminal investigation or a special authorization for dignitary protection. In addition, the Chief of Police must certify that the infiltrator is necessary to the investigation.

Informants must be given special instructions not to use unlawful techniques to obtain information or to participate in unlawful acts of violence. They are to be directed to avoid initiating a plan to commit criminal acts, and must not participate in criminal activity unless specifically authorized by the Seattle Police Department as necessary to obtain information for prosecution.

Limits are put on the use of Modus Operandi files; Seattle Police Department personnel are prohibited from inciting any person to commit an unlawful violent act; and Department personnel are prohibited from communicating information known to be false or derogatory in order to disrupt a lawful political or religious activity.

Several long sections of the ordinance exempt certain types of records and information from most of the ordinance, including: (1) police administrative records; (2) incidental references to private sexual or restricted information when the information forms an incidental part of any one of eleven possible routine information sources for the police; (3) certain confidential communications (such as consultations between police officers and attorneys, ministers, or psychologists); (4) materials open to public inspection; and (5) special investigations (such as investigations of governmental corruption).

### *Criminal intelligence section*

Experts testifying before the City Council advised that the functions and responsibilities of the Seattle Police Department's Criminal Intelligence Section should be established in the Seattle Police Intelligence Ordinance. By giving clear policy guidance to police officers collecting intelligence, the experts argued, the City Council would improve the officers' effectiveness and avoid the problems of overly broad intelligence investigations. Don Harris, a national expert on police intelligence, argued persuasively that this guidance is an essential part of effective police intelligence legislation.

In response to this advice, the City Council included Chapter 7 of the Seattle Police Intelligence Ordinance which outlines the functions and responsibilities of the Criminal Intelligence Section. These functions and responsibilities include: (1) collecting and analyzing data about organized criminal activity; (2) coordinating criminal intelligence information throughout the Department; (3) determining the reliability and accuracy of information coming into the Department and distributing information as needed to the Department's investigative section; and (4) developing methods to evaluate the effectiveness of the Criminal Intelligence Section.

The ordinance also summarizes the responsibilities of police officers collecting and processing intelligence. Criminal intelligence personnel must maintain the security of the criminal intelligence files and follow ethical and legal police procedures in collecting intelligence.

### *The Auditor*

The basic enforcement mechanism of the Seattle Police Intelligence Ordinance is an independent Auditor. The Auditor is nominated by the Mayor and confirmed

by the nine-member Seattle City Council. The Auditor should possess the following qualities and characteristics:

- (a) A reputation for integrity and professionalism, as well as the ability to maintain a high standard of integrity in the office;
- (b) A commitment to and knowledge of the need for and responsibilities of law enforcement, as well as the need to protect basic constitutional rights;
- (c) A commitment to the statement of purpose and policies of the ordinance;
- (d) A history of demonstrated leadership experience and ability;
- (e) The potential for gaining the respect of departmental personnel and citizens of the City of Seattle;
- (f) The ability to work effectively with the Mayor, the City Council, the City Attorney, the Chief of the Seattle Police Department, departmental personnel, public agencies, private organizations, and citizens; and
- (g) The ability to work effectively under pressure.

The Auditor may be removed from office by the Mayor for cause upon filing a statement of the Mayor's reasons for the removal with the City Council. The qualifications required of the Auditor and the checks and balances between the Mayor and City Council are intended to enhance the independence, integrity, and effectiveness of the Auditor.

Under the ordinance, the Auditor has access to all police files and records except personnel files, internal investigation files, and special investigations which the King County Prosecutor certifies must be withheld from the Auditor's review. The Prosecutor is authorized to withhold information from the Auditor that includes investigations of government corruption, investigations of organized criminal activity, or potential conflicts of interest for the Auditor. In those special investigations, the Prosecutor in effect acts as the Auditor and certifies compliance with the ordinance. The Auditor must keep all police files and records confidential, and the Auditor must audit all police files at least twice a year.

If the Auditor has a reasonable belief that restricted information has been collected in a manner substantially violating the ordinance, the Auditor must notify by certified mail any person about whom the restricted information has been collected.

The Seattle Police Intelligence Ordinance also creates a civil cause of action against The City of Seattle if police officers: (1) collect private sexual information in violation of the ordinance; (2) collect restricted information in violation of the ordinance if the police officer knew that no authorization could validly have been granted; (3) use an infiltrator to collect restricted information in a political or religious organization when there is no reasonable suspicion of criminal activity; (4) incite another person to commit unlawful violent activity; or (5) communicate information known to be false or derogatory with the intent to disrupt lawful political or religious activities. The City of Seattle must pay actual damages incurred by persons whose rights have been violated. Since actual damages are difficult to assess when violations of a person's civil rights are involved, a person may elect to seek liquidated damages between \$500 and \$1,000 for various violations of the ordinance.

With an independent Auditor notifying persons whom the Auditor suspects have been wrongfully investigated and with the civil liability of the City, the ordinance creates an effective mechanism for citizen enforcement. In addition, the Chief of Police has significant enforcement responsibilities.

Under the ordinance, the Chief of Police is required to prepare, adopt, and implement rules and regulations governing the use of informants, infiltrators, and photographic surveillance techniques. The Chief is also required to prepare an annual report providing a statistical analysis of authorizations granted, authorizations involving the use of infiltrators and informants, the types of unlawful activities investigated, the purposes of the authorizations, and the number of prosecutions based on the information collected pursuant to authorizations.

Internal police disciplinary action taken to enforce the ordinance must also be reported by the Chief. Seattle police officers who violate the ordinance are subject to administrative penalties, including fines, suspension, demotion, and termination. Supervisors of police officers who violate the ordinance are also subject to administrative discipline for the misconduct of their subordinate officers.

#### CONCLUSION

Because of the complexity and pioneering nature of the Seattle Police Intelligence Ordinance, we anticipate encountering unexpected problems while implementing the new ordinance. Therefore, the Mayor and City Council have

committed themselves to reviewing and, where appropriate, revising the ordinance within 18 months after its effective date. The effective date of the ordinance will be January 1, 1980.

Seattle is proud to be the first local jurisdiction in the United States to enact reasonable and effective legislation governing police intelligence operations. Concerned citizens and dedicated public officials devoted hundreds perhaps 1000s of hours trying to strike the elusive balance between protecting civil rights and promoting effective law enforcement. The ordinance received unusual editorial support from both of Seattle's daily newspapers, a rare occurrence. More important, the ordinance received the unanimous support of the City Council, which is rare for complex and controversial legislation.

What we have learned from Seattle's experience in developing the ordinance can be summarized very simply. First, developing legislation that strikes an equitable and workable balance between civil rights and law enforcement requires a monumental effort and inspiration from a wide variety of concerned citizens and public officials. It's an enormous job.

Second, police officers need clear, understandable, and workable guidelines to carry out their law enforcement duties. They are already overburdened with reams of paperwork and sophisticated legal distinctions. Each new reporting requirement under the ordinance was thoroughly considered in light of these concerns.

Third, citizens need a credible enforcement mechanism in legislation governing police conduct. Otherwise, there's no confidence in it. An independent Auditor and civil liability for violations of the ordinance provide credible channels for citizen involvement in enforcing the law.

Finally as was pointed out to the chairman, no legislation attempting to strike a balance between civil rights and law enforcement is going to be perfect. No member of the City Council or the Drafting Committee thinks the ordinance is perfect. Representatives from the Coalition on Government Spying would like additional safeguards in the ordinance. The Seattle Police Department feels that some areas are more strict than they ought to be. On the whole, however, the Drafting Committee members support the ordinance as a just and workable balance of civil rights and law enforcement. More important, the 9 members of the City Council believe it.

The critical balance between civil rights and law enforcement can and should be established for our police agencies by elected public officials. Elected officials should not wait for a scandal of abuses to seek this difficult balance. Police intelligence legislation was not needed in Seattle primarily because our police were abusing civil rights, but because the police were zealously performing their duty as they saw it. As Justice Brandeis warned:

"Experience should teach us to be the most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberties by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

I appreciate the opportunity to discuss Seattle's Police Intelligence Ordinance. If you have any questions, I will do my best to answer them at the appropriate time.

## Seattle City Council

## Memorandum

FOR CITY COUNCIL MEETING Monday, July 2, 1979 2:00 p.m.
---------------------------------------------------------------

Date: June 27, 1979

To: Members, Seattle City Council

 From: Randy Revelle, Vice-Chairman  
 Public Safety and Justice (PS&J) Committee
 
Subject: Proposed Police Intelligence Ordinance

## I. INTRODUCTION

On Monday, July 2, 1979, the Seattle City Council will discuss and vote on the attached ordinance regulating investigations and intelligence operations of the Seattle Police Department (SPD). As described in my June 25, 1979 memorandum on the history of this proposed police intelligence ordinance, the PS&J Committee has met twelve times to discuss and provide policy guidance for drafting this ordinance. On Wednesday, June 27, 1979, the PS&J Committee (Councilmen Smith, Revelle, and Miller) discussed the attached ordinance and voted unanimously to recommend its enactment by the City Council.

The proposed police intelligence ordinance is the result of several years of dedicated effort and hundreds of hours of hard work by many public officials and citizens. The proposed ordinance was prepared by a Police Intelligence Drafting Committee which includes representatives from the Mayor's Office, the Law Department, the King County Prosecutor's Office, the SPD, the Law and Justice Planning Division of the Office of Policy Planning, the Coalition on Government Spying, and the City Council. While all of the individuals listed at the end of this memorandum participated on the Drafting Committee, Jorgen Bader (Assistant City Attorney), Leo Poort (Legal Advisor to the Chief of Police), Larry Baker (Attorney for the Coalition on Government Spying), and Steve Loyd (my former Legislative Assistant), were particularly patient and persistent throughout the tedious drafting process.

As a member of the Drafting Committee, the Coalition on Government Spying, (the American Civil Liberties Union, the American Friends Service Committee, and the National Lawyers Guild) represented the interests and concerns of a wide range of responsible community organizations, including the League of Women Voters, the Seattle-King County Bar Association, the Seattle Urban League, the Church Council of Greater Seattle, the King County Democratic Party, and several unions. Attached for your information is a list of the fifty-two community organizations supporting the Coalition's principles for effective police intelligence legislation. The Coalition's representatives on the Drafting Committee added an important, continuous citizen perspective throughout the drafting process.

Although none of the Drafting Committee members is fully satisfied with the proposed police intelligence ordinance, all members seem to agree that it is time to enact the proposed ordinance and evaluate it on the basis of actual experience.

## Police Intelligence Ordinance

June 27, 1979

The proposed police intelligence ordinance is designed to help protect our most cherished civil liberties, while enabling the SPD to conduct effective investigations into unlawful activity. The proposed ordinance is the first of its kind in the nation. It should be a model for the many other jurisdictions considering the enactment of similar legislation.

In my judgment, Seattle's new Chief of Police is doing a professional job of protecting the public safety with due regard to citizens' civil liberties and rights of privacy. The police intelligence ordinance should be enacted now not because the SPD is rife with abuses to civil liberties, but because, as Justice Brandeis has warned:

"Experience should teach us to be the most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers for liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

## II. DESCRIPTION OF THE PROPOSED POLICE INTELLIGENCE ORDINANCE

The proposed police intelligence ordinance is relatively long and complex. It is divided into ten chapters and 43 sections which organize the 26 pages and more than 7,000 words used to articulate the ordinance's principles, regulations, and other provisions. The following is a brief, chapter-by-chapter summary of the proposed ordinance.

Chapter I -- Purpose, Policies, and Definitions

The first chapter of the proposed police intelligence ordinance establishes the purpose, policies, and definitions used throughout the ordinance. The purpose of the ordinance is to allow the SPD to investigate and collect information on a person only so long as the investigation does not unreasonably infringe upon that person's right to privacy and other constitutionally recognized rights, liberties, and freedoms. The proposed ordinance establishes what is a reasonable and what is an unreasonable infringement on a person's rights during police investigations.

The policies established in the ordinance are: (1) equal enforcement of the law is necessary to protect constitutional liberties; (2) the collection of information is legal only if the information is relevant to criminal investigations or other legitimate SPD functions; (3) periodic reviews of SPD files are required to determine conformance with the ordinance and their relevancy to criminal investigations and other legitimate SPD functions; (4) standards for disclosure of information to other agencies and individuals are necessary to protect all persons' rights of privacy; and (5) whenever there is a choice between two equally effective investigative techniques, the SPD officer should use the technique with the least adverse impact upon lawful political or religious activity.

Eleven key concepts are defined in the ordinance. The most important definitions are: (1) restricted information, which means information

## Police Intelligence Ordinance

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about a person's political or religious associations, activities, beliefs, or opinions; (2) private sexual information, which means information about a person's sexual practices or orientation; (3) departmental personnel, which means all persons paid by City funds and acting under the direction of an SPD officer; (4) purge, which means to return, destroy, or secure in a restricted depository; (5) infiltrator, which means a person directed by the SPD to pose as a member of a political, religious, or community organization to obtain information about the organization; and (6) informant, which means a person directed by the SPD to obtain information.

Chapter 11 -- Scope, Exemptions, and Exclusions

The second chapter exempts the following types of records and information from most of the ordinance provisions controlling the collection, receipt, or transmission of information: (1) SPD administrative records; (2) incidental references to private sexual or restricted information when the information forms an incidental part of any one of eleven possible routine information sources for the SPD; (3) confidential communications (such as consultations between police officers and psychologists, doctors, attorneys, and chaplains); (4) materials open to public inspection; and (5) special investigations, which include investigations of persons charged with a crime by a prosecutor or an investigation of government corruption. Certain other activities (such as police officers' activities as private citizens, investigations of police officers by the SPD's Internal Investigations Section, and compliance with a court order) are excluded from the ordinance.

Chapter 111 -- Handling Private Sexual Information

Departmental personnel are prohibited from collecting private sexual information unless the information is relevant to the investigation of an observed sex crime, concerns a felony where the motivation for the crime may be sexual in origin, the violation of the law is related to sexual activity, or the information is about a fugitive and may reasonably lead to the fugitive's arrest.

If the SPD receives private sexual information from another criminal justice agency, the information must be purged within seven working days unless the information could have been collected by the SPD using the standards described in the previous paragraph. Private sexual information cannot be transmitted to another governmental agency unless the agency needs the information under circumstances that would have permitted the SPD to collect the information.

A log must be kept of each written transmission of private sexual information to other police agencies so the auditor may review the legality of the transmission.

Chapter 1V -- Handling Restricted Information for Criminal Investigations

Restricted information -- which is information about a person's political or religious associations, activities, beliefs, or opinions -- cannot be collected without an authorization from a supervising SPD officer. An authorization may be granted only under the following circumstances: (1) there is a reasonable suspicion that the subject is involved in criminal activities as a principle, a witness, or a victim; (2) the restricted

## Police Intelligence Ordinance

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information is relevant to the investigation of the criminal activity; and (3) the collection of the restricted information is consistent with the policies and other provisions of the ordinance.

The auditor must be given notice of each authorization issued. Authorizations are effective for no more than 90 days. Additional authorizations may be granted by the Chief of Police for up to 90 day periods as necessary to complete an investigation.

An authorization must be submitted in writing and contain the following six pieces of information: (1) the identity of the subject; (2) the suspected violation of the law under investigation; (3) an explanation of the restricted information and its relevancy to the violation of the law; (4) a statement of the facts and circumstances that create the reasonable suspicion that the subject was involved in criminal activity; (5) an explanation of the protective measures taken to avoid unreasonable infringement upon the constitutional rights, liberties, and freedoms described in Section 1 of the ordinance; and (6) if an informant or infiltrator is to be used, why the use of an informant or infiltrator is deemed necessary for law enforcement purposes.

Restricted information received from other criminal justice agencies must be purged within seven working days, unless an authorization is obtained that includes the six pieces of information summarized above. Restricted information cannot be transmitted to other government agencies unless the agency submits facts sufficient to obtain an authorization under the ordinance. A log must be kept of each written transmission containing restricted information to other police agencies so the auditor may review the legality of the transmission. Documents containing restricted information transmitted to other government agencies must be stamped with a prominent notice limiting dissemination and use of the information.

#### Chapter V -- Handling Restricted Information for Protecting Dignitaries

SPD officers assigned to provide necessary security for visiting officials and dignitaries may collect restricted information by: (1) obtaining an authorization for a criminal investigation under Chapter IV of the ordinance; (2) reviewing public documents, talking with demonstration organizers, or accepting unsolicited tips; or (3) obtaining a special authorization for dignitary protection where there is a reasonable suspicion that the subject of an investigation could pose a threat to the life or safety of a visiting official or dignitary.

If restricted information is gathered from public documents, demonstrators, or tips, or pursuant to a special authorization, the information must be kept in limited access dignitary protection files. Those files are to be used only for dignitary protection. They can only be accessed when the SPD has received notice of a visiting official or dignitary, or when the files are reviewed and purged by an SPD officer and the auditor.

Special authorizations to collect restricted information for protecting a dignitary must include most of the information necessary for obtain-

June 27, 1979

ing an authorization for a criminal investigation, must also include the arrival and departure date of the dignitary, and the Chief of Police must find there is a reasonable suspicion that the subject of the investigation could pose a threat to the life or safety of a visiting dignitary. Notice of each special authorization for protecting dignitaries must be given to the auditor.

The rules for receiving and transmitting restricted information for dignitary protection to other criminal justice agencies are generally the same rules used for receiving and transmitting restricted information during criminal investigations. There is one exception, however. A task force of law enforcement agencies may operate for up to ten days prior to a dignitary's visit and may exchange information to protect the dignitary during that time. All restricted information provided by the SPD to other law enforcement agencies during task force operations must be prominently stamped with a notice limiting dissemination or use of the information.

All restricted information collected by the SPD in a task force for dignitary protection must be purged, unless the Chief of Police issues an authorization or certifies that the subject of the information poses a continuing threat to the dignitary. A log must be kept of all SPD/task force transmissions.

#### Chapter VI -- Police Operations

The SPD cannot use infiltrators to pose or act as members of a political or religious organization, unless the infiltrator is justified as part of the authorization for a criminal investigation or a special authorization for dignitary protection. The Chief of Police must also certify that the infiltrator is necessary to the investigation and that the infiltrator will perform his or her assignment in a manner designed to avoid infringement upon the political rights, religious liberties, or the freedoms of expression and association. The Chief of Police is also directed to establish SPD rules and regulations for reviewing the use of infiltrators and their methods.

Informants paid to collect restricted information must be instructed not to use unlawful techniques to obtain information, not to participate in unlawful acts of violence, not to initiate a plan to commit criminal acts, and not to participate in criminal activity unless specifically authorized by SPD officers as necessary to obtain information for prosecution. Paid informants are also subject to the authorization and special authorization requirements and other regulations outlined throughout the ordinance.

The sixth chapter also limits SPD use of modus operandi files, prohibits department personnel from inciting any person to commit an unlawful violent act, and prohibits department personnel from communicating information known to be false or derogatory in order to disrupt a lawful political or religious activity.

Chapter VII -- Criminal Intelligence Section

The seventh chapter outlines the functions of the SPD's Criminal Intelligence Section and the responsibilities of criminal intelligence personnel. The functions of the Criminal Intelligence Section are to: (1) collect and analyze data about organized criminal activity; (2) determine the reliability and accuracy of information coming through the SPD; (3) coordinate criminal intelligence information throughout the SPD; (4) exchange relevant intelligence information with other law enforcement agencies; (5) disseminate information between SPD investigative sections to improve criminal investigations; and (6) develop methods to evaluate the effectiveness of the Criminal Intelligence Section. Criminal intelligence personnel must maintain the security of the criminal intelligence files and follow ethical and legal police procedures in collecting information.

Chapter VIII -- Auditing and Notice Requirements

The Mayor is authorized to nominate an auditor, subject to confirmation by the City Council. The auditor serves a three year term, but may be removed by the Mayor for cause. The auditor should have: (1) a reputation for integrity and professionalism; (2) a commitment to and knowledge of the responsibilities and needs for law enforcement and protection of basic constitutional rights; (3) demonstrated leadership experience and ability; (4) the potential for obtaining the respect of police officers and citizens; (5) an ability to work effectively with citizens, elected officials, and government agencies; and (6) the ability to work effectively under pressure.

The auditor is given access to all SPD files and records except personnel files, Internal Investigation Section files, confidential communications, personal files of the Chief of Police, and special investigations which the King County Prosecutor certifies must be withheld from the auditor's review. Special investigations designated by the Prosecutor to be withheld from the auditor's review may include investigations of governmental corruption, investigations of organized criminal activity, or potential conflicts of interest for the auditor. Special investigations excluded from the auditor's review shall be reviewed and certified by the Prosecutor to assure compliance with the provisions of the ordinance. For those special investigations, the Prosecutor shall act in every respect as the auditor.

The auditor must keep SPD files and records confidential, as prescribed by State law and the police intelligence ordinance. The auditor shall audit the SPD files at least once every 180 days. The audit and review of SPD files must be conducted in SPD facilities. The auditor shall review all the authorizations issued by the SPD, conduct a random check of SPD files and indexes, review materials designated for purging, and prepare a written report of the audit for the Mayor, City Council, City Attorney, and the City Comptroller.

If the auditor has a reasonable belief that restricted information has been collected in a manner substantially violating the police intelligence ordinance and creating a civil liability for the City, the auditor

## Police Intelligence Ordinance

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must notify by certified mail any person about whom the restricted information has been collected.

Chapter IX -- Civil Liability, Enforcement, and Penalties

The police intelligence ordinance creates a civil cause of action against the City of Seattle when SPD personnel: (1) collect private sexual information in violation of the ordinance; (2) collect restricted information in violation of the ordinance when the SPD officer knew that no authorization could validly have been granted; (3) use an infiltrator to gather information in a political or religious organization when there is no reasonable suspicion of criminal activity; (4) incite another person to commit unlawful violent activity; or (5) communicate information known to be false or derogatory with the intention of disrupting lawful political or religious activity.

Unless evidence establishes that there is a greater amount of damages, the damages payable for injuries proximately caused by collecting private sexual or restricted information shall be \$500 for each person. The damages payable in the event of injury proximately caused by improperly using an infiltrator shall be \$1,000 for the infiltrated organization. Actual damages shall be payable in the event of an injury proximately caused by inciting a person to commit violence, or communicating information known to be false or derogatory with the intention of disrupting lawful activity.

The City reserves rights of all defenses at law for allegations of civil liability arising from the police intelligence ordinance.

The Chief of Police is authorized to promulgate rules and regulations implementing the police intelligence ordinance. He is required to promulgate rules and regulations governing the use of informants, infiltrators, and photographic surveillance techniques.

The Chief of Police is required to prepare an annual report indicating the number of authorizations granted and the number of authorizations involving the use of infiltrators and informants, a statistical analysis of the purposes of the authorizations, the types of unlawful activity investigated, the number of prosecutions based on information gathered pursuant to authorizations, and any internal disciplinary action taken to enforce the police intelligence ordinance.

Administrative penalties are established for SPD officers who violate the proposed ordinance. SPD supervisors are also subject to administrative discipline for the misconduct of their subordinate officers.

Chapter X -- Ancillary Matters

The last chapter requires that the Mayor and City Council review the police intelligence ordinance within 18 months after its effective date. The effective date is January 1, 1980.

Attached for your information and review is a table of contents of the police intelligence ordinance. The foregoing description of the proposed ordinance

## Police Intelligence Ordinance

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is intended to be a summary, not a comprehensive review of the ordinance.  
 If you have specific questions about the proposed ordinance, please consult  
 the attached ordinance or contact me as soon as possible.

RR/sl/kg

CC: Mayor Charles Royer

ATTN: Hugh Spitzer, Legal Counsel to the Mayor

Doug Jewett, City Attorney

ATTN: Paul Bernstein, Assistant City Attorney

Jorgen Bader, Assistant City Attorney

Norm Maleng, King County Prosecutor

ATTN: David Boerner, Chief Deputy Prosecutor, Criminal Division

Patrick Fitzsimons, Chief, Seattle Police Department

ATTN: Ray Connery, Assistant Chief

Leo Poort, Legal Advisor to the Chief

Lieutenant Pat Munter, Commander, Criminal Intelligence Section

Shelly Yapp, Acting Director, Office of Policy Planning

ATTN: John Beckwith, Law and Justice Planning Division

Kathleen Taylor, Coordinator, Coalition on Government Spying

ATTN: Lawrence Baker, Attorney

Kate Pflaumer, Attorney

Jerry Berman, Legislative Counsel, American Civil Liberties Union

Steven Loyd

Police Intelligence Ordinance

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## Coalition on Government Spying

American Civil Liberties Union • American Friends Service Committee • National Lawyers Guild

SEATTLE GROUPS CALLING FOR EFFECTIVE LEGISLATION TO CONTROL  
POLICE INTELLIGENCE ACTIVITIES:

American Civil Liberties Union of Washington  
AFSCME, local 1488  
American Friends Service Committee  
Aradia Women's Health Center  
Boilermaker's Union  
Cascade Community Center Workers  
Cascade Community Clinic  
El Centro de la Raza  
Choose an Effective City Council (CHECC)  
Church Council of Greater Seattle  
Concillio for the Spanish Speaking of King County  
Country Doctor Clinic  
Crabshell Alliance  
The Dorian Group  
Father Garcia, Blessed Sacrament Church  
Feminist Coordinating Council  
Forty Third Distric Democrats  
Freedom Socialist Party  
Gay Community Center  
Gray Panthers  
IBEW, local 77, Unit 102  
International Longshoremen's and Warehousemen's Union (ILWU),  
local 19  
King County Bar Association  
King County Democratic Central Committee  
King County Women's Political Caucus  
King County Democratic Party Platform Convention (1978 Platform)  
National Abortion Rights Action League, Seattle Chapter  
National Commission on Law Enforcement and Social Justice  
National Lawyers Guild, Seattle Chapter  
National Organization for the Reform of Marijuana Laws (NORML),  
Washington Chapter  
Public Defender Association  
Radical Women  
La Raza Law Forum  
People's Coalition for Peace and Justice  
Reverend Sam McKinney, Mt. Zion Baptist Church  
Sea-King Media Access  
Seattle Tenants Union  
Seattle Urban League  
Sydney Miller Medical Clinic  
Thirty Second District Democrats

(over)

Police Intelligence Ordinance

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**Seattle Groups Calling for Effective Legislation to Control  
Police Intelligence Activities  
Page two.**

Thirty Sixth District Democrats  
 Union of Democratic Filipinos (KDP)  
 Union of Sexual Minorities  
 United Workers Union - Independent  
 University Unitarians for Social Justice  
 Washington Democratic Council  
 Washington Women Lawyers, Seattle Branch  
 Women's Institute of the Northwest  
 Women's International League for Peace and Freedom  
 Young Lawyer's Section, King County Bar Association  
 Young Workers Liberation League  
 Washington State Democratic Party Convention (1978 Platform)

Coalition on Government Spying

**ESSENTIAL  
PRINCIPLES  
FOR  
EFFECTIVE  
LEGISLATION**

Ban on political surveillance, harassment and  
agents provocateur;

Strict limitations on use of informants in  
criminal investigations;

Standards for commencing an investigation  
which allow for monitoring;

Focus of intelligence activities on organized  
crime, narrowly defined;

Limits on dissemination of information to  
other police agencies;

Procedures for closing and sealing files;  
access to files by targets of investigations;

Audit and supervision procedures for the  
intelligence function, including independent  
audits;

Provisions for record keeping and public  
reporting;

Realistic and enforceable criminal and civil  
penalties.

POLICE INTELLIGENCE ORDINANCE

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ORDINANCE 108333

AN ORDINANCE establishing policies governing the Seattle Police Department in collecting, receiving, and transmitting information; establishing procedures, controls, and prohibitions on the collection and use of particular types of information; regulating and forbidding certain police operations; establishing the powers of a criminal intelligence section and its personnel; and providing enforcement procedures, administrative penalties, and civil remedies.

WHEREAS, freedom of speech, press, thought, association, and assembly, as well as the right to petition the government for redress of grievances, are among our most cherished civil liberties, and the right of privacy is indispensable to individual liberty; and

WHEREAS, the duty of the Seattle Police Department is to protect the public safety and individual rights; and

WHEREAS, the substantive prohibitions in this ordinance which preclude: (1) the collection of private sexual or restricted information in the absence of requisite facts (Sections 11 and 13); (2) the use of infiltrators absent certain circumstances (Section 23); (3) the incitement of unlawful violent activity (Section 26(a)); and (4) the use of false or derogatory information to disrupt lawful religious or political activity (Section 26(b)) are for the benefit of individual citizens in relation to their rights of personal privacy, as well as their constitutional rights and liberties; if an injury proximately results from a violation of any of these substantive prohibitions, expending public funds to make the injured party whole fulfills a public purpose; and

WHEREAS, as distinct from the substantive prohibitions, all authorization procedures and internal controls are for the administration of municipal government and the Seattle Police Department; none of the procedures and controls establishes any protections or rights owing to or for the benefit of anyone individually; no private rights are created in or may be based upon the absence of an authorization alone or a procedural irregularity; and the civil liability established in Section 33 against The City of Seattle is, and is intended to be, exclusive of all causes of action arising under this ordinance; and

WHEREAS, The City of Seattle's annual operating budgets have provided for a Criminal Intelligence Section in the Seattle Police Department; and stating the powers, functions, and responsibilities of the Section's personnel will provide guidance for the performance of their duties and a standard by which to measure their conduct; Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

I. PURPOSE, POLICIES, AND DEFINITIONS

Section 1. Statement of Purpose. This ordinance shall be interpreted and implemented in a manner to permit the collection and recording of information for law enforcement purposes, so long as these police activities do not unreasonably: (a) infringe upon individual rights, liberties, and freedoms guaranteed by the Constitution of the United States or of the State of Washington -- including, among others, the freedom of speech, press, association, and assembly; liberty of conscience; the exercise of religion; and the right to petition government for

redress of grievances; or (b) violate an individual's right to privacy.

Section 2. Policies. The following policies shall govern the collection and recording of information by departmental personnel:

- (a) No person shall become the subject of the collection of information on the account of a lawful exercise of a constitutional right or civil liberty; no information shall be collected upon a person who is active in politics or community affairs, unless under the same or similar circumstances the information would be collected upon another person who did not participate actively in politics or community affairs;
- (b) All information collected shall reasonably appear relevant to the performance of an authorized police function; no information shall be collected or used for political purposes;
- (c) When a police officer knows of two or more techniques to collect restricted information and each would be equally practical and effective, the officer should use the technique which he reasonably believes will have the least adverse impact upon lawful political and/or religious activity;
- (d) Information indexed for ready retrieval, other than correspondence files, shall be reviewed periodically and only that deemed relevant to present and future law enforcement activities or required by law shall be retained;
- (e) To protect rights of privacy of the citizenry and to preserve the confidentiality of communications, disclosure of information shall be limited to records open for public inspection, to arrest notices and information disclosed to the public for law enforcement purposes, and/or to information needed by:
  - (1) criminal justice agencies in the performance of their official functions;
  - (2) persons with a legitimate interest in the information and persons making inquiry with their consent;
  - (3) persons with a right to disclosure under a statute, implementing regulation, ordinance, or court order;
  - (4) persons conducting research for scientific or law enforcement purposes under assurance of confidentiality; and
  - (5) agencies with regulatory responsibilities for which the information is pertinent; and
- (f) Disclosure of information from records closed to public inspection shall be limited to those facts and materials reasonably deemed relevant to the

purposes for the disclosure, unless the disclosure occurs pursuant to a subpoena or court order, the Public Disclosure Act (RCW Chapter 42.17), the Criminal Records Privacy Act (RCW 10.97.070), or other statute mandating disclosure, or the subject of the information consents to its disclosure.

Section 3. Definitions. When the following words or their derivations are emphasized, the definitions below apply:

- (a) Auditor means the person described in Section 29.
- (b) Collect means to write down or preserve information in a tangible form as a record or file of the Department.
- (c) Department means the Police Department of The City of Seattle.
- (d) Departmental personnel means an officer or employee of The City of Seattle assigned to the Department, and any individual paid by the City pursuant to vouchers drawn by the Chief of the Department or a fiscal officer assigned to the Department and acting under the direction and control of an officer or employee in the Department.
- (e) Infiltrator means a person acting under the direction of the Department, who is a member or associate -- or poses or acts as a member or associate -- of a political or religious organization, an organization formed for the protection or advancement of civil rights or civil liberties, or an organization formed for community purposes, and who agrees to provide or provides information about the organization to the Department on a continuing basis without disclosing his or her relationship to the Department.
- (f) Informant means a person other than an officer or employee of The City of Seattle assigned to the Department:
  - (i) who provides information to departmental personnel about a person in consideration of a personal benefit; or
  - (ii) who is engaged, directed, or controlled by the Department.
- (g) Person means any individual, group of individuals, unincorporated association, and/or corporation.
- (h) Private sexual information -- when not emphasized in Sections 4, 5, 6, and 7(d) -- means any information about an individual's sexual practices or

orientation. When emphasized, it excludes any such information within the scope of Sections 5 through 10 dealing with administrative records, incidental references, confidential communications, materials open to public inspection, special investigations, and exclusions, respectively.

(i) Purge means to return, destroy, or deny use of information by means such as removal to a secure depository with access restricted solely to specific individuals for purposes of defending a lawsuit, complying with a court order, preserving evidence possibly valuable to a defendant in a criminal case or pending commitment proceeding, and auditing compliance with this ordinance. Purge shall include deletion of information from affected materials and from Department indexes.

(j) Reasonable suspicion means a rational inference that is based on articulable facts.

(k) Restricted information -- when not emphasized in Sections 4, 5, 6, 7(d), 23, 33(c), and 35 -- means any information within paragraphs (i) through (iii) below. When emphasized, it excludes any such information within the scope of Sections 5 through 10 dealing with administrative records, incidental references, confidential communications, materials open to public inspection, special investigations, and exclusions, respectively. Restricted information means information about:

- (i) an individual's political or religious associations, activities, beliefs, or opinions;
- (ii) the political or religious activities, beliefs, or opinions and the membership, mailing, subscription, or contributor lists of a political or religious organization, an organization formed for the protection or advancement of civil rights or civil liberties, or an organization formed for community purposes; or
- (iii) an individual's membership or participation in such an organization, in a political or religious demonstration, or in a demonstration for community purposes.

## 11. SCOPE, EXEMPTIONS, AND EXCLUSIONS

Section 4. Scope. Those sections of this ordinance controlling the collection, receipt, and/or transmission of information (Sections 11 through 22) do not apply to administrative records (Section 5), incidental references (Section 6), confidential communications (Section 7), materials open to public inspection (Section 8), special investigations (Section 9), and the exclusions (Section 10), as long as Department indexing does not cite any private sexual or restricted information other than information in a proper name, unless specifically authorized by this ordinance.

Except for the exclusion of Section 10(a), the policies in Section 2 apply to the provisions of this ordinance. All Department records are subject to audit, unless excluded by Section 30(a) through (e).

Section 5. Administrative Records. Administrative records pertain to Department operations and/or public relations, are comparable in character to files and records maintained by other City departments, and exclude Investigatory files of the Department. Examples of administrative records include routine correspondence files; employment and personnel records; jail records on prisoners' religious preferences and customs; information for providing chaplain, escort, and ancillary community services; records of evidence, lost or stolen property, and custodial property inventoried without regard to informational content; and itinerary information used for providing security and protection for an official, dignitary, or consenting individual. Indexing may cite private sexual or restricted information only for a valid administrative purpose.

Section 6. Incidental References. Private sexual or restricted information within one of the following classifications may be collected as an incidental reference:

- (a) The information appears as an incidental reference in a standard report form, in response to a general questionnaire completed by an applicant or witness using his or her own words, or in a more general description or statement;
- (b) The information forms an incidental part of the statement, verification, or rebuttal of a legal defense that has been raised by a suspect or may reasonably be anticipated; or an incidental part of the activities or associations

- 1 of a homicide, unconscious, or kidnapped victim during the seventy-two (72)  
 2 hours immediately preceding an incident or investigation;
- 3 (c) The information relates to a suspect whose identity is unknown and may not  
 4 then be indexed by a true name;
- 5 (d) The subject of the information supplies the information to known depart-  
 6 mental personnel;
- 7 (e) The information arises in the course of and is used exclusively for traffic  
 8 code enforcement and traffic safety purposes;
- 9 (f) The information is part of a recording maintained in connection with in-  
 10 coming emergency calls or a video and/or sound recording authorized by RCW  
 11 9.73.090;
- 12 (g) The information is collected and maintained by the Department Communi-  
 13 cations Division for use exclusively in connection with emergency calls and is  
 14 isolated from general Department files;
- 15 (h) The information appears in records relating to child abuse or protective  
 16 custody services contemplated by RCW Chapter 26.44; or in confidential  
 17 records of Community Service Officers used in handling domestic disputes,  
 18 youth counseling, or like community services; and/or
- 19 (i) The information appears as part of the text of a printed law enforcement  
 20 manual, the disclosure of which would be detrimental to effective law en-  
 21 forcement.

22 Section 7. Confidential Communications. The following communications and  
 23 materials are confidential:

- 24 (a) A professional consultation between departmental personnel and a Depart-  
 25 ment psychologist, or between a person detained in the City Jail and a jail  
 26 physician or other medical personnel when a confidential relationship exists  
 27 between the participants;
- 28 (b) A confidential communication between departmental personnel and any legal  
 advisor assigned to the Department or to represent the Department or  
departmental personnel, as well as memoranda of such communications;
- (c) A confidential communication between departmental personnel and a chaplain

or other religious official; or

- (d) Information identifying the name of an Informant which is privileged from disclosure in a court of law, and information collected about an Informant as part of and relevant to a background investigation to determine his or her reliability, provided the Informant has consented to its collection. Such a confidential communication may not contain private sexual information or restricted information about any person other than the Informant, except as an incidental reference (Section 6).

Section 8. Materials Open to Public Inspection. Materials such as the following qualify as materials open to public inspection if any person may examine them during regular Department business hours:

- (a) Information about anticipated political or religious events -- such as parades, processions, rallies, demonstrations, or assemblies contemplated in Ordinance 108200, Chapter 11.25 (The Seattle Traffic Code), as amended, or a successor traffic code -- and such material as may be necessary in connection with the events for the direction and control of traffic, to protect the public health and safety, and to secure public liability insurance covering The City, provided that complainant identification information may be kept confidential when required by RCW 42.17.310(1)(e);
- (b) Information in a reference center or library;
- (c) Printed literature from a criminal justice agency relating to law enforcement duties that may be obtained pursuant to the public disclosure rules of the Department prepared pursuant to State law; and/or
- (d) Any arrest circular or "Wanted Poster" received by the Department as part of a general circulation by a governmental agency to law enforcement agencies.

Section 9. Special Investigations. Information may be collected in connection with the following special investigations when:

- (a) The information is collected upon the request of the Attorney General of the State of Washington, a prosecuting attorney, a city attorney, or the Department of Justice with respect to a person charged with a crime or ordinance violation, or with respect to a person facing civil commitment

after commitment proceedings have been filed, and the information reasonably appears relevant to the investigation or judicial proceedings.

- (b) The information is collected about a person reasonably suspected of involvement in corruption or malfeasance in office of a governmental official or employee, and the information reasonably appears relevant thereto; and/or
- (c) The information is collected about an applicant as part of and relevant to a background investigation of the applicant for employment or promotion with The City of Seattle or a City License or Commission; or the subject of the information has consented in writing to its collection.

Section 10. Exclusions. This ordinance shall not apply to:

- (a) Activities by departmental personnel as private citizens not related to their law enforcement functions;
- (b) The collection of information about police conduct by the Department Internal Investigations Section;
- (c) The participation of departmental personnel in their official capacities in The City's administrative and legislative processes with respect to Department operations to the same extent and in the same manner as other City departments; or
- (d) Personal communications to, and personal papers of, the Chief of the Department personally maintained in his own office, provided such materials do not include investigatory information.

Nothing in this ordinance shall restrict or forbid departmental personnel from complying with a court order.

### III. HANDLING PRIVATE SEXUAL INFORMATION

Section 11. Collection and Use. Private sexual information shall not be collected unless the information involves a reported or observed sex crime; an apparent felony where a motivation for the crime may reasonably be suspected to be sexual in origin; a violation of the law that by its nature is commonly related to sexual activity (for example, prostitution, pandering, procuring, lewd conduct, or pornography); or the information is about a subject or fugitive and may reasonably

1 lead to his or her arrest. The private sexual information collected shall reasonably  
 2 appear relevant to the investigation of unlawful activity or to making an arrest of  
 3 the subject of the information.

4 Section 12. Receipt and Transmission. Unless Section 11 applies, private  
 5 sexual information received from another criminal justice or governmental agency  
 6 shall be purged within the sooner of seven working days or of the placement of  
 7 other material which was received with the private sexual information into an  
 8 investigatory file, the commingling of the other material with other Department  
 9 files and records, or the indexing of the other material in the Department's record  
 10 system.

11 Private sexual information shall not be transmitted to another criminal  
 12 justice or governmental agency unless:

- 13 (a) The recipient agency has a need for the information which satisfies the  
 14 requirements of Section 11, or a subpoena, court order, or statutory mandate  
 15 requires the production of the information; and a log of each written  
 16 transmission is maintained which contains the name of the subject of the  
 17 information and the recipient agency; or
- 18 (b) The information is transmitted to the King County Prosecuting Attorney or  
 19 the City Attorney in connection with a pending investigation of unlawful  
 20 activity or a judicial proceeding.

#### 21 IV. HANDLING RESTRICTED INFORMATION FOR CRIMINAL INVESTIGATIONS

22 Section 13. Collecting Restricted Information. Departmental personnel shall  
 23 not collect any restricted information for any use other than for dignitary  
 24 protection without an authorization by a unit commander of the rank of lieutenant  
 25 or above; provided, when time is of the essence, departmental personnel may  
 26 collect restricted information under the condition that it shall be purged within  
 27 twenty-four (24) hours unless an authorization for its collection is granted.

28 An investigating officer may secure an authorization under this Section 13  
 from a lieutenant or higher ranking officer who is in his or her chain of command or  
 has supervision over the investigation. The authorization may adopt a written

request from a prosecuting attorney, a city attorney, the Attorney General of the State of Washington, or the Attorney General of the United States made in the course of and for performance of the duties of their respective offices.

Such an authorization may be granted only when:

- (a) There is a reasonable suspicion that the subject of the restricted information has engaged in, is engaging in, or is about to engage in unlawful activity, or that the restricted information about the subject may reasonably lead to his or her arrest, or that the restricted information is collected about a victim or witness for the purpose of discovering his or her knowledge or evaluating his or her reliability;
- (b) The restricted information to be collected appears relevant to the investigation of the suspected unlawful activity described in subsection (a) above, or appears relevant to making an arrest of the subject of the restricted information; and
- (c) The collection of the restricted information is consistent with the statement of purpose, policies, and other provisions of this ordinance.

No informant or infiltrator may be used to collect restricted information about a victim or witness. Restricted information about a victim or witness may not be indexed under his or her name.

When time is of the essence, an authorization may be requested and given orally, but the authorization shall be reduced to writing within two business days.

Notice of each authorization shall be given to the Auditor.

Authorizations shall be in effect for no more than ninety (90) days.

Section 14. Contents of an Authorization. A unit commander or higher ranking officer of the Department shall include in the written authorization his or her opinion that the criteria in Section 13 are satisfied, as well as the following information:

- (a) The identity of the subject about whom the restricted information will be collected, if known;
- (b) The violation of law under investigation to which the restricted information is deemed relevant and, in the event that the violation of law has not yet occurred, the approximate date of the violation, if known;

- 1 (c) An explanation of the restricted information likely to be sought and its rele-
- 2 vance to the violation of law or the arrest of the subject;
- 3 (d) A statement of the facts and circumstances creating a reasonable suspicion
- 4 that the subject of the restricted information has engaged in, is engaging in,
- 5 or is about to engage in unlawful activity, or that restricted information may
- 6 lead to the subject's arrest; or if the restricted information concerns a victim
- 7 or witness, the facts and circumstances creating a reasonable suspicion that
- 8 the victim or witness has information about the particular incident under
- 9 investigation, and an explanation of why collection of the restricted
- 10 information is deemed necessary;
- 11 (e) If an informant or infiltrator will be used to gather restricted information,
- 12 the reasons why the use of an informant or infiltrator is deemed necessary for
- 13 law enforcement purposes; and
- 14 (f) An explanation of the protective measures to be taken to avoid unreasonable
- 15 infringement upon the rights, liberties, and freedoms described in Section
- 16 1(a).

17 Section 15. Additional Authorizations. After an authorization expires, the

18 Chief of the Department may authorize the collection of restricted information for

19 additional periods of up to ninety (90) days each as often as may be necessary for

20 the completion of an investigation of specified unlawful activity, but in no event

21 longer than the expiration of the statute of limitations or the prosecution of a case.

22 The additional authorization, together with the documentation preceding it, shall

23 describe the restricted information already collected and identify the investigation

24 to be completed or the case to be prosecuted. An additional authorization shall

25 satisfy the criteria in Sections 13 and 14, be substantiated by the information

26 already collected, and justify the need to collect additional restricted information.

27 Section 16. Actions After Authorization. The collection, maintenance, and

use of restricted information pursuant to an authorization under Sections 13/14 or

15 shall be limited to the scope stated in the authorization and shall conform to its

protective measures.

Section 17. Receipt of Restricted Information. Unless an authorization has

1 been given under Sections 13/14, 15, or 21, restricted information received from  
 2 another criminal justice or governmental agency shall be purged or, if the  
 3 restricted information is useful for dignitary protection, transferred to depart-  
 4 mental personnel with such responsibilities within the sooner of seven working days  
 5 or of the placement of other material which was received with the restricted  
 6 information into an investigatory file, the commingling of the other material with  
 7 other Department files and records, or the indexing of the other material in the  
 8 Department's record system.

9 Section 18. Transmission of Restricted Information. Restricted information  
 shall not be transmitted to another criminal justice or governmental agency unless:

- 10 (a) The recipient agency has a need for the information based upon facts suf-  
 11 ficient to obtain an authorization under Sections 13/14 or 21, or a subpoena,  
 12 court order, or statutory mandate requires the production of the information;  
 13 a log of each written transmission shall be maintained which contains the  
 14 name of the subject of the information and the recipient agency; or  
 15 (b) The information is transmitted to the King County Prosecuting Attorney or  
 16 the City Attorney in connection with a pending investigation of unlawful  
 activity or a judicial proceeding.

17 Wherever practical, the first page and each page containing restricted information  
 18 in a document transmitted to a recipient agency shall contain a prominent notice  
 19 limiting dissemination or use to the specific purposes for which the document was  
 20 transmitted, unless otherwise authorized by the Chief of the Department.

21 Nothing in this Section 18 shall prevent departmental personnel from trans-  
 22 mitting an evaluation of information or pooling information in a common inves-  
 23 tigation of a series of related incidents as long as restricted information is not  
 24 disclosed.

## 25 V. HANDLING RESTRICTED INFORMATION FOR PROTECTING DIGNITARIES

26 Section 19. Collecting and Filing Restricted Information. Departmental  
 27 personnel assigned the duty of providing for the security and protection of visiting  
 28 officials and dignitaries may collect restricted information for investigatory pur-

poses under Sections 13 through 17, or for dignitary protection under Sections 20, 21, and 22, and may transmit restricted information in accordance with Sections 18 or 22.

Unless an authorization pursuant to Sections 13/14 or 15 allows its use for a criminal investigation, restricted information collected under Sections 20, 21, and 22 shall be subject to the following conditions:

- (a) The restricted information shall be maintained in a separate record system under the custody of the departmental personnel assigned to providing security and protection for visiting officials and dignitaries (called "dignitary protection files" herein), indexed separately, and accessible only to these departmental personnel and their superiors;
- (b) Collection of restricted information, other than an unsolicited communication, may not begin before departmental personnel receive notice of an anticipated arrival date of the visiting official or dignitary for whom security and protection are to be provided, and shall cease upon notice that the anticipated visit will not occur or upon the visitor's departure from The City, whichever occurs sooner;
- (c) A log shall be kept, including each access made to the dignitary protection files and the reason therefor;
- (d) The restricted information shall be used only for providing necessary security and protection for visiting officials and dignitaries;
- (e) The restricted information shall be purged within sixty (60) days after the authorization for its collection expires, unless a unit commander certifies that the subject of the information poses, has posed, or has made a threat to the life or safety of a visiting official or dignitary; or the retention of the information may be necessary for pending or future civil or criminal litigation involving The City of Seattle; and
- (f) The dignitary protection files shall be reviewed annually under the direction of the Chief of the Department, and the restricted information deemed no longer relevant to protecting visiting officials and dignitaries shall be purged. Transfers to other uses may be made of restricted information collected

under Sections 20 or 21 with an authorization under Sections 13, 14, and 15.

Section 20. Collecting Restricted Information Without an Authorization.

Departmental personnel assigned the duty of providing for the security and protection of visiting officials and dignitaries may, without an authorization:

- (a) Collect restricted information from records open for public inspection, newspapers and libraries, and written communications directed at the general public;
- (b) Collect restricted information about a demonstration or activity directly from a person who is planning the demonstration or activity in connection with a visiting official or dignitary and who is advised of the purpose of the inquiry;
- (c) Accept an unsolicited communication;
- (d) Collect restricted information from another criminal justice or governmental agency which was originally derived from public sources, direct communication with the subject of the information, or as an unsolicited communication; and/or
- (e) When time is of the essence, collect restricted information on the condition that it shall be purged within twenty-four (24) hours after receipt, unless an authorization is granted under Sections 13 or 21.

Section 21. Authorizations for Dignitary Protection. The Chief of the Department may authorize the collection of restricted information when there is a reasonable suspicion that the subject of the restricted information could pose a threat to the life or safety of a visiting official or dignitary. When time is of the essence, an authorization may be requested and given orally, but the authorization shall be reduced to writing within two business days. An authorization under this Section 21 shall limit the use of the restricted information collected to dignitary protection purposes, unless an authorization granted under Sections 13/14 or 15 allows the information to be used for a criminal investigation.

An authorization for dignitary protection shall include:

- (a) The identity of the subject about whom the restricted information will be collected, if known;

- (b) The name of the visiting official or dignitary to be protected and his or her anticipated date of arrival;
- (c) An explanation of the restricted information likely to be sought;
- (d) The facts and circumstances that provide the Chief of the Department a reasonable suspicion that the subject of the restricted information could pose a threat to the life or safety of a visiting official or dignitary;
- (e) If an informant or infiltrator will be used to gather restricted information, the reasons why the use of an informant or infiltrator is deemed necessary for dignitary protection; and
- (f) An explanation of the protective measures to be taken to avoid unreasonable infringement upon the rights, liberties, and freedoms described in Section 1(a).

Notice of each authorization shall be given to the Auditor.

The collection of restricted information pursuant to an authorization for dignitary protection shall be limited to the scope stated in the authorization and shall conform to its protective measures.

Section 22. Receipt and Transmission of Restricted Information. Sections 17 and 18 controlling the receipt and transmission of restricted information from and to another criminal justice or governmental agency applies to the handling of restricted information by departmental personnel assigned the duty of providing for the security and protection of visiting officials and dignitaries, unless the information is collected and transmitted in conjunction with a task force. Restricted information collected for an operating task force may be transmitted or purged with other task force materials.

Departmental personnel serving on or working with a task force of cooperating law enforcement and governmental agencies to provide security and protection while a visiting official or dignitary is present, and/or for a period of up to ten days prior to his or her scheduled visit, may:

- (a) Collect restricted information from cooperating agencies, provided that the information shall be purged within ten days after the visiting official or dignitary departs, unless an authorization under Sections 13/14 or 15 or a

certification under Section 19(e) allows its retention; and/or

- (b) Transmit restricted information collected by departmental personnel to other cooperating agencies provided that, wherever practical, the first page and each page containing restricted information in a document transmitted shall contain a prominent notice limiting dissemination or use of the information to the specific purposes for which the document was transmitted, unless otherwise authorized by the Chief of the Department.

A log of each written transmission shall be maintained which contains the name of the subject of the restricted information and the recipient agency. Nothing in this Section 22 shall prevent departmental personnel from transmitting an evaluation of information or pooling information in a common investigation of a series of related incidents as long as restricted information is not disclosed.

#### VI. POLICE OPERATIONS

Section 23. Use of Infiltrators. No Infiltrator shall be used or recruited to gather restricted information on a continuing basis from within and about a political or religious organization, an organization formed for the protection or advancement of civil rights or liberties, or an organization formed for community purposes, unless:

- (a) Use of the Infiltrator is contemplated by an authorization to collect restricted information on the organization pursuant to Sections 13/14, 15, or 21;
- (b) The Chief of the Department approves in writing the use of the Infiltrator and certifies that infiltrating the organization is necessary and that reasonable means have been designed to (i) confine collection of the restricted information to matters contemplated by the authorization; (ii) conduct the collection of the information in a manner consistent with the statement of purpose, policies and provisions of this ordinance; and (iii) conform to protective measures specified by the authorization to avoid unreasonable infringement upon the rights, liberties, and freedoms described in Section 1(a); and
- (c) The Chief of the Department or his designee has established a procedure for review at the end of each authorization period to determine compliance with

all rules, regulations, and procedures designed to minimize the acquisition, retention, and disclosure of restricted information which does not relate to the matter under investigation and to protect against unreasonable infringement upon the rights, liberties, and freedoms described in Section 1(a).

Section 24. Use of Informants. An informant paid by the City to collect restricted information shall be instructed that in carrying out an assignment he or she shall not:

- (a) Participate in unlawful acts of violence;
- (b) Use unlawful techniques to obtain information;
- (c) Initiate a plan to commit criminal acts; or
- (d) Participate in criminal activities of persons under investigation, except insofar as the supervisor over the investigation determines that such participation is necessary to obtain information needed for purposes of prosecution.

Section 25. Use of Modus Operandi (MO) Files. Restricted information about a person under a true name may only be added to an MO file where there is probable cause to suspect the subject of the restricted information has committed unlawful activity. This Section 25 does not limit indexing restricted information about an incident by subject matter.

Section 26. Prohibited Activities. Departmental personnel in the course and scope of their duties shall not willfully:

- (a) Incite any person to commit unlawful violent activity or engage another person to do so, provided that nothing in this Section 26 shall be interpreted to prohibit thwarting, detecting, or securing evidence of unlawful activity conceived by another, or the use of decoys; or
- (b) Communicate information known to be false or derogatory with the intention of disrupting any lawful political or religious activity, unless such communication occurs in the course of or in connection with a judicial proceeding, or serves a valid law enforcement purpose.

## VII. CRIMINAL INTELLIGENCE SECTION

1       Section 27. Powers and Functions. Whenever appropriations for the  
2       Department's Criminal Intelligence Section are included in the City's annual  
3       operating budget, the Section shall be authorized to perform the following  
4       functions, subject to the provisions of this ordinance:

- 5       (a) To collect, evaluate, organize, and analyze data and specific investigative  
6       information about the existence, structure, activities, and operations of  
7       organized criminal activity which appears to involve regular coordination and  
8       organization among a number of individuals, and the participants in such  
9       activities;
- 10      (b) To collect, evaluate, and classify information about incidents of unlawful  
11      activity, confirming the degree of accuracy of the information whenever  
12      possible; to store and/or disseminate only that information which appears to  
13      have a reasonable degree of reliability; and to purge information that is no  
14      longer relevant;
- 15      (c) To coordinate such information into a centralized system of criminal in-  
16      telligence information and to study, detect, and explain any meaningful  
17      patterns of unlawful activities;
- 18      (d) To furnish and exchange relevant criminal intelligence information with  
19      criminal justice agencies, to maintain liaison with other criminal intelligence  
20      agencies, and to initiate inquiries and conduct criminal investigations;
- 21      (e) To support other Department activities and units by delivering pertinent  
22      criminal intelligence information and to coordinate information that involves  
23      multiple investigatory divisions or units, at the direction of the Chief of the  
24      Department;
- 25      (f) Upon request and at the direction of the Chief of the Department, to assist  
26      law enforcement agencies, the City Attorney, the King County Prosecuting  
27      Attorney, and the United States District Attorney in developing evidence for  
28      purposes of criminal prosecution of organized criminal activities;
- 29      (g) To develop training programs that assist the Department's tactical units in  
30      detecting and gathering information relevant to criminal investigations being  
31      conducted by the Criminal Intelligence Section; and

- (h) To develop methods for evaluating the effectiveness of the Criminal Intelligence Section in accomplishing its law enforcement purposes and safeguarding the constitutional rights and privacy of all individuals.

Section 28. Responsibilities. In performing their responsibilities, departmental personnel assigned to the Criminal Intelligence Section shall:

- (a) Maintain the integrity and security of all information contained in the Department's Criminal Intelligence Section filing system;
- (b) Follow ethical and legal police procedures in obtaining information, including, but not limited to, the provisions of this ordinance; and
- (c) Whenever practical, avoid direct involvement in the conduct of tactical law enforcement operations.

#### VIII. AUDITING AND NOTICE REQUIREMENTS

Section 29. Appointment and Responsibilities of the Auditor. The Mayor shall appoint an Auditor, subject to confirmation by the City Council, to monitor compliance with this ordinance. The Auditor shall serve for a term of three years and may be reappointed by the Mayor, subject to confirmation by the City Council. The Auditor may be removed from office for cause by the Mayor by filing a statement of reasons for the removal with the City Council.

The Auditor should possess the following qualities and characteristics:

- (a) A reputation for integrity and professionalism, as well as the ability to maintain a high standard of integrity in the office;
- (b) A commitment to and knowledge of the need for and responsibilities of law enforcement, as well as the need to protect basic constitutional rights;
- (c) A commitment to the statement of purpose and policies of this ordinance;
- (d) A history of demonstrated leadership experience and ability;
- (e) The potential for gaining the respect of departmental personnel and citizens of The City of Seattle;
- (f) The ability to work effectively with the Mayor, the City Council, the City Attorney, the Chief of the Department, departmental personnel, public agencies, private organizations, and citizens; and

(g) The ability to work effectively under pressure.

Except as limited by Section 30, the Auditor shall have access to all Department files and records, including non-conviction data pursuant to RCW 10.97.050(4).

Section 30. Limitations on the Auditor. The Auditor shall not examine the following:

- (a) Department personnel files;
- (b) Internal Investigation Section files;
- (c) Files of confidential communications as defined in Section 7;
- (d) Personal files of the Chief of the Department which are excluded from this ordinance by Section 10(d); and
- (e) Specific case files which the King County Prosecuting Attorney personally certifies in writing need to be withheld from the Auditor's review because the files involve investigations of corruption or malfeasance in office of a governmental official or employee, a potential conflict of interest for the Auditor, or investigations of organized criminal activity conducted as a continuing enterprise solely for the purpose of obtaining monetary gain wholly or in part through racketeering, vice, narcotics, gambling, fencing, or similar economic criminal activity. As to each file, the Prosecuting Attorney's certificate shall state that he has personally reviewed the case file and found that the file complies with this ordinance. The Prosecuting Attorney's certificate shall also include a summary apprising the Auditor of the scope and purpose of the investigation. With respect to the certified files, the Prosecuting Attorney shall exercise all the powers and discharge all the responsibilities normally exercised and discharged by the Auditor under the provisions of this ordinance.

In discharging his or her responsibilities, the Auditor shall protect the confidentiality of Department files and records and shall also be bound by the confidentiality provisions of the Criminal Records Privacy Act (RCW Chapter 10.97), the Public Disclosure Act (RCW 42.17), and the provisions of RCW 43.43.356. The Auditor shall not identify the subject of an investigation in any

public report required by this ordinance. The Auditor shall not remove from Department facilities any record, extract, or other information, the disclosure of which is exempt from public disclosure under the Public Disclosure Act (RCW 42.17.310). Any violation of the confidentiality of Department files and records or the provisions of this ordinance shall be sufficient cause for removal of the Auditor.

Section 31. Audit Procedures and Standards. The Auditor shall conduct an in-place audit of Department files and records at unscheduled intervals not to exceed one-hundred eighty (180) days since the last audit. The Department shall provide temporary space for the Auditor to conduct the audit in secure areas close to the records to be reviewed by the Auditor.

The audit shall be prepared and published pursuant to the following provisions:

- (a) In conducting an audit, the Auditor shall:
  - (i) Review each authorization granted pursuant to Sections 13/14, 15, or 21, together with investigative files associated with the authorizations;
  - (ii) Perform a random check of Department files and indexes;
  - (iii) Review files and records containing private sexual or restricted information designated for purging; and
  - (iv) Prepare and forward a written report of the audit to the Mayor, the City Council, the City Attorney, and the Seattle Comptroller for filing as a public record.
- (b) The Auditor's report shall contain a general description of the files and records reviewed and a discussion of any substantial violation of this ordinance discovered during the audit. A preliminary report shall be delivered by the Auditor to the Chief of the Department for review and comment. The Chief of the Department shall review and comment on the preliminary report within twenty (20) days after receipt of the report. The Auditor shall submit the final report within thirty (30) days after receipt of the Chief's comments.
- (c) The Chief of the Department shall:
  - (i) Forward to the Mayor, the City Council, the City Attorney, and the City Comptroller within ten working days of receipt of the Auditor's final report the Chief's written comments on the report; and

- (ii) Cause an immediate investigation into the circumstances of any apparent violations of this ordinance reported by the Auditor.

Section 32. Notice of Substantial Violations. The Auditor shall notify by certified mail any person about whom restricted information has been collected where the Auditor has a reasonable belief that the restricted information was collected in violation of this ordinance and would create civil liability under Section 33. Notice shall be sent to the person's last known address within six months after the expiration of the last authorization, or within sixty (60) days after the Department, the City Attorney, or the King County Prosecuting Attorney determines that no prosecution will be brought as a result of the unlawful activity prompting the investigation, whichever date is earlier. The Auditor's notice does not constitute an admission of fact or liability by The City of Seattle.

#### IX. CIVIL LIABILITY, ENFORCEMENT, AND PENALTIES.

Section 33. Civil Liability. Subject to the limitations of this Section 33 and Section 34, a person shall have a right of action against The City of Seattle based on this ordinance for injuries proximately caused by departmental personnel willfully in the scope and course of their duties:

- (a) Collecting private sexual information when Section 11 prohibits collection of such information;
- (b) Collecting restricted information where the prohibition of Section 13 applies, no authorization was obtained, and under the facts and circumstances known to departmental personnel, no authorization could validly have been granted; or, alternatively, the restricted information collected was both outside the scope of the authorization granted and was not relevant to an investigation of unlawful activity, the making of an arrest, or a judicial proceeding;
- (c) Using an infiltrator with the intention of collecting restricted information from within and about a political or religious organization, an organization formed for the protection or advancement of civil rights or liberties, or an organization formed for community purposes in violation of Section 23 where there is no reasonable suspicion that the subject of the restricted information

has engaged in, is engaging in, or is about to engage in unlawful activity, or that the restricted information will lead to the subject's arrest;

- (d) Inciting another person to commit unlawful violent activity or engaging another person to do so in violation of Section 26(a); and/or
- (e) Communicating information known to be false or derogatory with the intention of disrupting any lawful political or religious activity in violation of Section 26(b), provided no cause of action may be based upon an arrest based upon probable cause or an order to disperse an assemblage made in accordance with Ordinance 102843, Section 12A.16.040.

Absent evidence establishing a greater amount of damages, the damages payable in event of an injury proximately caused by collection of private sexual or restricted information in violation of this ordinance, as contemplated by Section 33 (a) or (b), shall be Five Hundred Dollars (\$500.00) to each subject of the private sexual or restricted information for all such information collected, and for the use of an infiltrator in violation of Section 23, as contemplated by Section 33(c), shall be One Thousand Dollars (\$1,000.00) aggregate for the organization and all its members as a class. The payment of damages under Section 33(c) to the organization, or its members as a class, is in addition to any rights of any person within the organization under Sections 33(a) or (b), above.

No cause of action may be based upon the activity of departmental personnel in complying with a court order, or an action taken pursuant to and within the scope of an authorization under Sections 13/14, 15, 21, or 23.

The City reserves all defenses at law consistent with this ordinance, including but not limited to consent, privilege, participation, and waiver, and as to departmental personnel or a City official, any defense arising in the employer/employee or principal/agent relationship.

**Section 34. Liability of Officers and Employees.** No cause of action may be based upon this ordinance against the Mayor, the Chief of the Department, any departmental personnel, or any other City officer or employee, individually, for any action or omission made in good faith in the scope and course of his or her duties. In the event such a lawsuit is brought against a City officer or employee,

1 individually, for such an action or omission, and the officer or employee cooperates  
 2 fully in defense of the lawsuit, The City Attorney may represent the individual and  
 3 defend the litigation. If the claim is deemed a proper one or judgment is rendered  
 4 against the City officer or employee individually, the judgment shall be paid by The  
 5 City in accordance with its procedures for the settlement of claims and payment of  
 6 judgments.

7 Section 35. Rules and Regulations. Consistent with the statement of pur-  
 8 pose, policies, and provisions of this ordinance, the Chief of the Department shall  
 9 promulgate rules and regulations to implement this ordinance in accordance with  
 10 the procedures of Ordinance 102228 (the City's Administrative Code), as amended,  
 11 or a successor ordinance. The rules and regulations shall be designed to protect  
 12 constitutional rights and personal privacy, so that investigations are conducted  
 13 without an unreasonable degree of intrusion and that private sexual and restricted  
 14 information obtained in the course of an investigation is properly authorized under  
 15 this ordinance.

16 The Chief of the Department shall also promulgate rules and regulations to  
 17 govern the use of informants, infiltrators, and photographic surveillance relating to  
 18 restricted information, consistent with the statement of purpose, policies, and  
 19 provisions of this ordinance, and may promulgate rules and regulations governing  
 20 other investigatory techniques to the extent he deems necessary to carry out the  
 21 statement of purpose, policies, and provisions of this ordinance.

22 Section 36. Department Reporting. The Chief of the Department shall  
 23 submit an annual report on the implementation of this ordinance to the Mayor, the  
 24 City Council, and the City Comptroller for filing as a public record. The annual  
 25 report shall indicate the number of authorizations granted under Sections 13/14, 15,  
 26 or Section 21; the number of certifications issued under Section 19(e); the number  
 27 of files withheld from the Auditor by the King County Prosecuting Attorney under  
 28 Section 30(e); the number of authorizations involving the use of infiltrators and  
informants; a statistical analysis of the purposes for which authorizations were  
 granted, the types of unlawful activity involved, the number of prosecutions based  
 thereon, the number of visiting officials or dignitaries for whom security

precautions were involved, and other meaningful information; a summary of any internal disciplinary action taken to enforce this ordinance; and a description of other actions taken to implement this ordinance. The foregoing information may be included in the Department's annual report.

Section 37. Administrative Penalties. Any departmental personnel in an office or other place of employment of The City who violates this ordinance, or any implementing rule or regulation of the Chief of the Department, shall be subject to the disciplinary proceedings and punishment authorized by the City Charter, Article XVI, including reprimand, suspension without pay, and discharge, or provided by Ordinance 107790, as amended (the City's Public Safety Personnel Ordinance), or a successor ordinance.

Section 38. Administrative Penalties for Supervisors. An official authorizing the collection of restricted information shall be subject to administrative discipline, as contemplated in Section 37, for misconduct of a subordinate officer in collecting the information authorized or failing to comply with all protective measures established in this ordinance.

#### X. ANCILLARY MATTERS

Section 39. Usages. The singular number includes the plural, unless the context clearly indicates otherwise.

The masculine includes the feminine with respect to a particular office or position.

Unless otherwise indicated, a reference to a city attorney, a prosecuting attorney, a district attorney, or an attorney general includes any deputy or assistant acting on the official's behalf.

The subtitles identified with Roman numerals and the section captions are for convenient reference only and do not limit or modify the substance of the text of this ordinance.

Section 40. Application. This ordinance shall not affect any action taken prior to its effective date.

Section 41. Severability. If any provision of this ordinance, or its application to any person or circumstances, is held invalid, the remainder of this ordinance, or

the application of the provision to other persons or circumstances, shall not be affected.

Section 42. Review. The Mayor shall review and report to the City Council on the implementation and operation of this ordinance within eighteen (18) months after its effective date. The City Council shall review and evaluate the Mayor's report and enact any necessary amendments to this ordinance.

Section 43. Effective Date. This ordinance shall take effect and be in force January 1, 1980.

Passed by the City Council the 2 day of July, 1979, and signed by me in open session in authentication of its passage this 2 day of July, 1979.

Approved by me this 2 day of July, 1979.

John Miller  
President of the City Council

Charles Roy  
Mayor

Filed by me this 2 day of July, 1979.

ATTEST:

E. L. Kian  
City Comptroller and City Clerk

(SEAL)

Published: \_\_\_\_\_

BY Raymond Arguine  
Deputy Clerk

# Seattle City Council

## Memorandum

Date: June 25, 1979

To: Members, Seattle City Council

FOR CITY COUNCIL MEETING Monday, July 2, 1979 2:00 p.m.
---------------------------------------------------------------

From: Randy Revelle, Vice-Chairman  
Public Safety and Justice (PS&J) Committee

Subject: History of PS&J Committee Review of Police Intelligence

For your background information, the following is a brief history of the PS&J Committee's efforts to develop an ordinance governing the intelligence operations of the Seattle Police Department (SPD). Later this week, I will distribute a summary of the police intelligence ordinance, as well as a copy of the ordinance itself.

### Early Background

During an October 24, 1974 City Council hearing on the confirmation of Acting Police Chief Robert Hanson, the City Council learned that in late March, 1974, the Acting Chief had discovered and destroyed about 100 SPD "intelligence" files. The names of persons or organizations on whom the SPD had collected information were not made public at that time.

A year later, in November, 1975, members of the news media published a list of about 150 persons on whom the SPD had kept "intelligence" files. It was also reported that those files, together with about 600 similar files, had been destroyed under the direction of Police Chief Robert Hanson.

During the City Council's Annual Budget Review in November, 1975, Councilman John Miller and I recommended a City Council review of the SPD's intelligence operations. As a result of our recommendation, in the 1976 Annual Budget the City Council unanimously adopted the following "Statement of Legislative Intent:"

"In approving without change the Mayor's Proposed 1976 Budget for the Police Intelligence Unit, the Seattle City Council understands that by February, 1976, the Mayor will review the policies, procedures, and operations of the Unit and present to the City Council proposed policies, procedures, controls, and monitoring processes for the Unit. These proposals should include specific criteria and a process by which the City Council can periodically review the operations of the Unit without endangering the objectives and security of the Police Department's intelligence program."

On December 12, 1975, Council President Sam Smith and I asked Mayor Uhlman to provide the City Council with written assurance that the SPD would not destroy any existing lists or other records of persons on whom SPD intelligence files had been kept until the City Council determined what information was needed for our review of police intelligence. In a December 18, 1975 letter, Mayor Uhlman replied: "I agree with you that there should be no change in the Department's records until your hearings have been concluded. I am asking Chief Hanson to comply with the request by copy of this letter."

Obtaining Information on Police Intelligence

On April 19, 1976, a "Blue Ribbon Committee" appointed in January, 1976 by Police Chief Hanson submitted to Mayor Uhlman a report entitled, "Statement of Policy and Mission for the Seattle Police Department's Intelligence Section." The report included recommendations on investigative restrictions, limitations on the dissemination of intelligence information, and a procedure for inspecting intelligence records to ensure compliance with adopted City policies.

Mayor Uhlman did not submit his report and recommendations on police intelligence to the City Council until October 5, 1976.

On December 12, 1976, Police Chief Robert Hanson and Woody Wilkinson, Administrative Assistant to Mayor Uhlman, briefed the PS&J Committee on the Mayor's report and recommendations on police intelligence.

On January 3, 1977, the City Council unanimously adopted Resolution 25410, including the following "Statement of Legislative Intent" for the 1977 Annual Budget:

"Because the Mayor did not complete his review of police intelligence and submit his report to the City Council until October 5, 1976, the City Council was unable to conduct a policy review of police intelligence prior to or as part of the City Council's 1977 Annual Budget Review. In approving without change the Mayor's Proposed 1977 Annual Budget for inspectional services (including the Intelligence Section), the Seattle City Council intends, prior to the First Interim Budget Review in 1977, to conduct a review of police intelligence and to adopt policies, procedures, controls, and monitoring processes for police intelligence. During the First Interim Budget Review in 1977, the City Council intends to review (and possibly revise) the 1977 Annual Budget of the Intelligence Section in light of the adopted policies, procedures, controls, and monitoring processes."

On February 7, 1977, the City Council unanimously adopted Resolution 25439, establishing the 1977-78 Council Work Program, which designated the Council's review of police intelligence as a high priority. On February 8, 1977, the PS&J Committee held a public hearing on Mayor Uhlman's report and recommendations on police intelligence.

Because of limited staff resources and the need to address other issues and projects, the PS&J Committee's review of police intelligence was suspended until July, 1977.

On July 26, 1977, the PS&J Committee sponsored a panel discussion by local and national experts on police intelligence to focus on: (1) legitimate purposes, objectives, and procedures for local police intelligence operations; (2) potential abuse of civil liberties and waste of police resources resulting from improper police intelligence operations; (3) strengths and weaknesses of Mayor Uhlman's proposed policies, procedures, controls, and monitoring processes for the SPD's Intelligence Section; and (4) methods of making the SPD's intelligence operations more effective at reducing crime.

## Police Intelligence History

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At my request, in August, 1977 two national experts on police intelligence -- Jerry Berman, Director of the Project on Domestic Surveillance at the Center for National Security Studies, and Don Harris, author of Basic Elements of Intelligence -- began work on a comprehensive model ordinance governing local police intelligence operations.

Because of my unexpected health problems and the need to address the Mayor's Proposed 1978 Annual Budget, the PS&J Committee's review of police intelligence was suspended until January, 1978.

On January 24, 1978, the PS&J Committee conducted a question-and-answer session with past and present operational and administrative commanders of the SPD Intelligence Section, testifying under oath. The session explored past and present policies, procedures, and operations of the SPD's Intelligence Section.

#### Developing a Police Intelligence Ordinance

On February 6, 1978, I met with Councilman Sam Smith, the new PS&J Committee Chairman, to brief him on the status of the Committee's work on police intelligence legislation. We agreed that Steve Loyd, my Legislative Assistant, would prepare a detailed decision agenda for an April 19, 1978 PS&J Committee meeting. The purpose of the meeting would be to discuss and vote on guidance for a draft ordinance establishing policies, procedures, controls, and monitoring processes for SPD intelligence operations.

Although the Berman/Harris comprehensive model ordinance governing local police intelligence operations was not finished, Jerry Berman and the Coalition on Government Spying (a local organization representing more than 50 groups concerned about police intelligence) prepared a proposed ordinance prohibiting and limiting certain SPD investigations. On February 7, 1978, I received a letter from the Coalition submitting the proposed ordinance for City Council review and action.

On March 16, 1978, Mayor Royer requested an opportunity to submit to the PS&J Committee a proposed ordinance governing police intelligence operations for the Committee's April 19, 1978 discussion of police intelligence. Councilman Smith and I agreed to the Mayor's request.

On April 14, 1978, the Mayor submitted to the City Council his proposed ordinance governing police investigations. On April 18, 1978, Steve Loyd submitted to the PS&J Committee members a detailed decision agenda for PS&J Committee consideration in developing policy guidance for a draft police intelligence ordinance.

On April 19 and 27, May 16 and 25, and June 5, 1978, the PS&J Committee discussed and voted on significant policy issues raised in the April 18, 1978 decision agenda. On June 5, 1978, the PS&J Committee formed the Police Intelligence Drafting Committee.

The Drafting Committee was chaired by Steve Loyd, my Legislative Assistant, and included representatives of the Mayor, City Attorney, King County Prosecutor, Law and Justice Planning Division of the Office of Policy Planning, Seattle Police Department, and the Coalition on Government Spying. The purpose of the Drafting Committee was to prepare a draft police intelligence

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ordinance that reflected the policies established during the PS&J Committee discussions held in April, May, and June, 1978.

From June 14 to August 30, 1978, the Drafting Committee met about nine times in five-hour sessions to resolve remaining issues and prepare a draft police intelligence ordinance consistent with the PS&J Committee's policy guidance. On June 29, 1978, the PS&J Committee met to provide further policy guidance for the Drafting Committee.

On September 7, 1978, the Drafting Committee published its first draft of the police intelligence ordinance and circulated the draft to all Drafting Committee members for review and comment. On October 4, 1978, the PS&J Committee met to discuss and vote on policy issues raised by members of the Drafting Committee while preparing the draft ordinance. After the PS&J Committee had given additional policy guidance, the Drafting Committee met to prepare a second draft of the police intelligence ordinance.

On November 14, 1978, the draft police intelligence ordinance was published and widely circulated for review and comment by citizens, community leaders, law enforcement agencies, and interested organizations. Between December 20, 1978 and January 24, 1979, interested persons and organizations submitted detailed comments on the draft ordinance. From January 29 to February 5, 1979, the Drafting Committee met several times with Councilman Revelle to: (1) discuss and act on all comments received on the draft police intelligence ordinance; and (2) identify significant policy issues for discussion and vote by the PS&J Committee.

On February 7, 1979, the PS&J Committee discussed and voted on several significant policy issues raised during the public review of the draft police intelligence ordinance. The PS&J Committee requested that legislation be prepared and submitted for Committee review and vote within thirty days. In late February, 1979, Steve Loyd prepared a third draft of the police intelligence ordinance in a reorganized format. On March 8, 1979, the draft ordinance was circulated to the Drafting Committee members for a technical review and comment.

At Mayor Royer's request, on March 21, 1979 Councilman Revelle met with the Mayor, City Attorney Doug Jewett, Chief of Police Patrick Fitzsimons, and King County Prosecutor Norm Maleng, to discuss general concerns they had about the draft police intelligence ordinance. On March 23, 1979, the King County Prosecutor and the Chief of Police requested that they be given until April 16, 1979 to comment on and offer specific changes to the draft police intelligence ordinance. On April 20, 1979, the Mayor submitted his comments and proposed changes to the draft police intelligence ordinance. On April 23, 1979, the King County Prosecutor submitted his comments and proposed changes.

On May 30/31 and June 1, 1979, the Drafting Committee met with Councilman Revelle to discuss and resolve policy and technical issues raised in the written comments from the Mayor, the City Attorney, and the King County Prosecutor. Based on those discussions, Steve Loyd and representatives of the Coalition on Government Spying, the Law Department, and the Seattle Police Department prepared a fourth draft of the police intelligence ordinance. On June 15, 1979, Councilman Revelle mailed copies of the draft ordinance to the Drafting Committee members for a technical review and comment.

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On June 22, 1979, the Drafting Committee members submitted to Councilman Revelle technical changes to the draft police intelligence ordinance. This Wednesday, June 27, 1979, the PS&J Committee will meet to discuss and vote on Councilman Revelle's fifth draft of the ordinance. Copies of the draft ordinance, if approved by the PS&J Committee, will be delivered on Wednesday to all City Councilmembers, together with the PS&J Committee recommendation and a summary of the proposed ordinance.

Next Monday, July 2, 1979, the City Council will discuss and vote on the PS&J Committee's proposed police intelligence ordinance. It better pass!

RR:sl:kb

cc: Mayor Charles Royer

ATTN: Hugh Spitzer, Legal Counsel to the Mayor

Doug Jewett, City Attorney

ATTN: Paul Bernstein, Assistant City Attorney

Jorgen Bader, Assistant City Attorney

Norm Maleng, King County Prosecutor

ATTN: David Boerner, Chief Deputy Prosecutor, Criminal Division

Patrick Fitzsimons, Chief, Seattle Police Department

ATTN: Ray Connery, Assistant Chief

Leo Poort, Legal Advisor to the Chief

Lieutenant Pat Hunter, Commander, Intelligence Section

Shelly Yapp, Acting Director, Office of Policy Planning

ATTN: Larry Gunn, Manager, Law and Justice Planning Division

John Beckwith, Program Coordinator

Kathleen Taylor, Coordinator, Coalition on Government Spying

ATTN: Lawrence Baker, Attorney

Kate Pflaumer, Attorney

Jerry Berman, Legislative Counsel, American Civil Liberties Union

Steven Loyd

Mr. EDWARDS. Thank you for a very excellent statement, Mr. Revelle.

Mr. Bernstein, you may proceed.

**TESTIMONY OF PAUL BERNSTEIN, DIRECTOR, CRIMINAL DIVISION,  
OFFICE OF THE CITY ATTORNEY**

Mr. BERNSTEIN. Members of the Subcommittee on Civil and Constitutional Rights, I am pleased to be able to respond to your invitation to appear here today.

My involvement with the Seattle legislation began in early 1978 at the time Mayor Royer submitted his draft legislation for consideration by Councilman Revelle's committee.

I participated as a spokesperson for the city attorney, an independently elected official. My background at that time included 6½ years of criminal prosecution experience.

It became apparent very early on in the legislative experience that the city would be adopting a lengthy and comprehensive ordinance. My efforts, therefore, were directed to attempting to minimize the adverse effects the legislation might have on the day-to-day routine police department activities, especially in those areas that dealt with political or religious beliefs and associations.

With the patience and willingness to discuss and explore the ramifications of each aspect of the legislation shown by Councilman Revelle, I believe that the end product will not adversely impact or burden most of what the Seattle Police Department does on a day-to-day basis.

This is a long way from the point at which we all started.

The various formal council hearings and the numerous informal drafting sessions were most productive when each point was examined in the light of how it would impact past cases, existing cases, or routine hypothetical cases.

If any single firm impression has come out of those sessions, it is that it was necessary to spend the time and the energy to examine each concept and each word in light of the committee's cumulative experience.

At least at that point, each legislative decision was made on the basis of full information.

A few examples of how this process influenced the end product may illustrate this point:

First, as pertains to "sexual preference information," sections 11 and 12 in the ordinance, the initial thrust of the legislation treated sexual preference information and political-religious information in the same way—including the written authorization and audit trail procedures.

After it became apparent that thousands of cases every year required legitimate collection and use of sexual preference information, the authorization process was dropped for that area.

It is also important that no examples of police abuse in this area were noted.

Second, in the area of the use of informants, the definition of the term as used in the ordinance is very broad. If an authorization process were needed to use informants in routine cases—for example, narcotics

and fencing cases—the Department would have been severely and unnecessarily burdened. The final legislation only requires written authorizations when the informant is to be used to collect restricted information—that is, political and religious information. Written warnings to the informant are required only when the informant is to be paid.

Third, the whole incidental reference section, section 6, is a reflection of this process of rationalizing the ordinance. It is a shopping list of exceptions to the written authorization procedure for the collection of restricted information.

Each of the nine exceptions reflect routine and clearly acceptable situations of the collection of restricted information as incidental to the main thrust of an investigation.

These are areas where police abuses are highly unlikely, especially if the information cannot be indexed for ready retrieval, which is a fact that is provided for in the ordinance.

Two other sections merit discussion at this time. The whole question of civil liabilities and penalties was hotly discussed. In the end, the city council decided to go with civil liability to be imposed on the city for substantive, as distinguished from procedural or administrative, violations of the ordinance.

Civil liability against the individual officer was rejected. The reasons and arguments are included in detail in the written testimony at pages 17 through 21.

The most effective sanction may well prove to be the administrative remedies which can include termination of employment for the officer.

Sanctions are also included for the officer's supervisor. As almost all police officers are career individuals, this is a powerful sanction not available against most citizens.

Moreover, by not having criminal sanctions in our ordinance, an officer in our jurisdiction can be required to cooperate with an investigation into any alleged irregularities in police procedures or actions, or be sanctioned for noncooperation.

Were the penalties for violation of the ordinance criminal, an officer could not be constitutionally required to waive his or her fifth amendment rights or be sanctioned.

The flow of information would thus be cut off.

The fact also remains that violations of any other laws by the police department to collect information, such as burglary laws or wiretap laws, remain criminal offenses, and can and should be prosecuted.

The independent auditor section is also of concern to the police. There was a good faith attempt to satisfy this concern in the final ordinance. The audit must be done in place—that is the files and records cannot be removed from the department.

Lists of informants' names are off limit to the auditor. Section 30 of the ordinance lists several other exempted areas.

Still the fact remains that the police feel that individuals who do not deal with the life-and-death experiences on the street that the police deal with simply do not have the awareness of the full need for confidentiality and security that the police have.

Individual officers are usually reluctant to reveal the identity of informants even to other members of the same department, and thus are very concerned with an outside individual potentially having access to almost all files and records.

If the auditor concept is created on the Federal level, there may be more alternatives than were available at the local level.

On our local level, the chief of police is appointed by and answers to the mayor. The mayor does not have the experience or the staff to satisfy the audit function.

On the Federal level, the Justice Department might be able to perform the function, although as a prosecutor I am aware that the police would be reluctant to share informant information even on that level.

One other local police concern should be mentioned, the ability to deal effectively with so-called political terrorist groups.

Under our ordinance, an informant or infiltrator cannot be used in this area without written authorization. The police cannot get a written authorization without information that would support a reasonable suspicion that the group or individuals within the group are about to commit, are committing, or have committed specific unlawful activity.

Under one scenario, our police might have received information from an unsolicited informant about an impending bank robbery by a political terrorist group. The police would be unable to request that the individual remain with the group and report future criminal plans should they develop.

The reason is that under our definitions, the informant would become an infiltrator, and the police cannot infiltrate without reasonable suspicion of specific impending criminal activity.

Mr. EDWARDS. Would that be conspiracy?

Mr. BERNSTEIN. No. At this point we don't know that the group is going to contemplate any future criminal activity. Therefore, we would not have a reasonable suspicion that they were going to contemplate future activity.

If we were going to infiltrate to collect restricted information, we would already have to have a reasonable suspicion under our ordinance. This is because we are dealing with political associations. Various members of the group, if they consider themselves a political group, could be considered political associates.

Under another scenario, we may be unable to cooperate with other police agencies to keep track of the whereabouts of members of groups that may have been involved with committing violent criminal acts in the past unless we had specific information that new specific criminal activity was about to occur.

Given the pattern of organization of these terrorist groups, it is unreasonable to expect that our police would legally be able to keep track of their activities until after the fact.

One of the arguments used in support of creating this situation in our legislation was that most investigation of terrorist activities was being done by Federal law enforcement officials, who have the experience and the expertise, and was not being done by local police at that level.

The written testimony is more detailed than this brief oral summary.

I would hope to answer any of the committee's questions at the appropriate time or seek answers to the questions and respond at a later date.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Bernstein.

[The complete statement follows:]

TESTIMONY OF  
PAUL J. BERNSTEIN  
Director, Criminal Division  
Seattle City Attorney Office  
Seattle, Washington

RE: H.R. 5030 - Proposed FBI Charter legislation and  
Seattle City Ordinance 108333, its history  
and development.

Seattle City Ordinance 108333 was passed on July 2, 1979, the first of its kind. It is called by some the "Police Intelligence Ordinance." In actuality, it is an ordinance which attempts to deal with all aspects of police work. My remarks are intended to be an outline of some of the concerns and issues which were debated in developing the ordinance. I assume that copies of the legislation and summaries of its sections are provided to the reader.

In a letter from Mayor Royer to the Seattle City Council dated April 14, 1979, the major objective of the legislation was stated as follows:

"We need legislation that governs the small percentage of [police] investigations that involve information on beliefs, activities and associations. This [legislation] will allow the police to pursue their proper role with more confidence."

The "beliefs, activities and associations" to be protected by legislation were identified in the opening paragraph of the Mayor's letter:

"Privacy, freedom of speech and freedom of association to influence government and political charge are the cornerstones of our democracy. All citizens are entitled to

be left alone, to hold and express any opinions they choose. Government, as a vehicle of the general public, should not act in ways that discourage free thought, speech and actions.

"Balanced against those objectives is the unquestioned duty of the police to investigate criminal activity. The Mayor recognized this objective as "... [the need to collect] information necessary to solve or prevent specific unlawful acts."

Although all police functions were finally addressed, special attention was given in the ordinance to protecting first amendment activities, especially as applied to political and religious areas. In addition, special attention was given to certain investigative techniques, especially as these techniques applied to first amendment activities. This was accomplished through internal controls, an audit trail, an independent auditor, and civil liability. Some of the length and complexity of the ordinance is due to wrestling with the implications of civil liability and the possible effects of the exclusionary rule as pertains to evidence obtained by police investigations in violation of the ordinance.

In short, the legislative process was one in which the individual's privacy rights and interests were balanced against the need for effective law enforcement. The role of the City Attorney's office was to provide technical drafting assistance as well as to explore with and educate various other participants in the legislative process as to the possible effects that various provisions might have on the ability of a large metropolitan police force to function

properly and effectively. My own perspective was as an attorney who had prosecuted various felony crimes for six and a half years in the King County Prosecutor's Office before becoming employed by The City of Seattle.

The following comments will follow the general structure of Ordinance 108333. With those sections which may be relevant to the committee's concern with H.R. 5030, comment will be made as to any conflict between the concerns of private rights and legitimate law enforcement needs and the resulting policy decision that was made by the City Council. Special attention will be given to those sections dealing with the independent Audit function and penalties per the request of Chairman Don Edwards. The section by section commentary will be more useful if read with a copy of Ordinance 108333 alongside.

# I. Purpose, Policies, and Definitions - Sections 1-3.

Section 1. Statement of Purpose. The attempted balance between privacy concerns and legitimate law enforcement needs was struck in this first sentence,

"... to permit the collection ... for law enforcement purposes, so long as these police activities do not unreasonably:  
a) infringe...."

An important philosophical debate developed between using the word "unreasonably" or the word "unnecessarily." Police and prosecutors felt that very few people would agree from case to case as to what investigation or investigative

technique was or was not necessary. Reasonableness was perceived as an important word as, for example, the United States Constitution does not prohibit all searches and seizures, but only those that are "unreasonable."

Section 2. Policies. These policies are very similar to those enunciated in H.R. 5030. An overriding policy was that investigations should be limited to those areas where there was a reasonable suspicion of unlawful activities or other legitimate police activities. The ordinance also strongly reflected the concern that political, religious, and/or private sexual beliefs or practices are those areas where special protections are needed from potential police abuses.

There was considerable discussion about the concept of "minimal intrusion." This is somewhat reflected as a policy in Ordinance 108333 in Section 2-e. Great care should be taken in drafting clearly, especially if civil liabilities or other severe penalties are possible for a violation of the law. Thus, for example, is there more or less intrusions into a person's privacy if an uniformed officer driving a marked patrol car goes to that person's residence to conduct an interview, or if a plain clothes detective is sent? Is using two officers to witness a defendant's statement more or less intrusive? If the use of two undercover officers to witness a narcotic's transaction more or less intrusive than using only one?

Section 3. Definitions.

c) Infiltrator. The definition approximates the concept in H.R. 5030. From early 1978, the intent of the Mayor, City Council, and concerned private citizens seemed to be to control more and more areas of police department activities. The first step was to address the collection and dissemination of all information. An article VI - Police Operations - was added much later to deal with police methods. The concept of "infiltrators" and their control was urged on the City in part as the result of work on H.R. 5030. The ordinance does require special procedures for use of infiltrators to collect information about unlawful activities in the political/religious area. In Section 23, an authorization procedure was developed requiring approval by the Chief of Police when infiltrators were to be used on an ongoing basis to collect restricted information. Thus, most narcotics or fencing operations can still be infiltrated without special authorizations.

f) Informant. The definition in the ordinance is very broad and includes all sources of information to the department for personal gain or at the direction of the department. This definition is a predicate for regulating the use of informants when used to collect restricted information (Sections 13 and 14, Section 21) and requiring special warnings to informants similar to H.R. 5030 - Section 24, only when the informant is paid. This balancing reflected the feeling of some citizens that the prime abuse of informants

were by those individuals paid by police to inform on and/or infiltrate political groups. In addition, there was the feeling that the possible presence of informants might chill first amendment activities in political groups and organizations.

h) Private sexual information - This was one of two major areas of special protection singled out by the ordinance.

k) Restricted information. This term reflected the other major area of citizen concern with respect to police investigations. The term is meant to be broad, and triggers most of the operative sections of the ordinance with respect to authorizations, notifications and controls. It was recognized during the legislative process that most of the daily work of a metropolitan police force would not be in the "restricted information" area and, therefore, most of the paperwork and administrative burdens should be avoided.

## II. Scope, Exemptions, and Exclusions.

Because the ultimate approach favored by the Mayor and City Council was to attempt to cover all areas of operation, it then became necessary to carve out numerous exceptions to the general policies and rules so as not to overburden the police where, historically, a national pattern of abuse has not been experienced. The approach favored by police and prosecutors would have been to have a much shorter, more direct ordinance aimed specifically at perceived abuses. It is with this observation, then, that I suggest that many of the developed balances in the ordinance occurred so that

specific liberties could be protected from specific abuses without being overly concerned in non sensitive areas where police abuses were not feared.

Section 4. Scope. The main thrust of this section was to concentrate attention on investigative materials and not administrative records. This section indicates that Sections 5 through 10 are not controlled by the ordinance as far as the collection of information is concerned as long as the information which pertains to restricted or private sexual matters is not indexed for ready retrieval. It was argued by the police, and finally accepted by the legislators that if the restricted and/or private sexual information was minimal and, in any event, could not be retrieved so as to be used for improper motives, that it was unwise to impose special administrative burdens on the police. Sections 5-10 are all groupings of the above concerns. Of special note are the following:

Section 6. Incidental References. The hallmark of this section is to exclude from special administrative requirements passing references to sensitive information obtained during the course of normal police work. This is distinguished from the situation where the objective of the investigation is to gather the sensitive information.

a) Standard police incident reports often contain references to a victim or witnesses age, sex, occupation. The occupation might be political or religious.

- b) Suspects often give alibies. One might be that the suspect was at a political rally or in church. It was finally agreed that the administrative procedures shall not be implemented merely to record this fact.
- d) Special procedures should not be necessary when the subject of the information provides the information.
- g) This section reflects that fact that the police communications section (telephone and radio operators) keep records on crank callers or calls from mentally disturbed individuals who have made false reports. Often the calls are of a religious or political nature. The file provides a check to prevent sending emergency responses in the future.

All of the above may appear mundane, but are essential to the daily operation of the police department. It is recognized that the FBI probably does not handle many of these types of problems. It is also recognized that the chosen approach of H.R. 5030 is directed more at techniques as distinguished from types of information collected, thus eliminating the need to carve out numerous minor exceptions.

#### Section 9. Special Investigations.

a) This exception was of great importance to the smooth operation of the prosecutors once cases were already filed. It was finally accepted that once a case was already filed, certain rules of discovery would act to protect a citizen from improper police investigations. Further protection was also recognized due to the prosecutor being

an independent official distinct and separate from the police officer. The prosecutors also felt strongly that if police had to do additional administrative work to collect additional information after a case was filed, they would be reluctant to do the necessary investigations.

b) The area of governmental corruption was especially sensitive. These areas might well involve restricted information. The need for written authorization was felt to open up the possibility that someone in the police department might become aware of the investigation and tip off the subject of the information, a governmental employee or official. It was also felt that if police had to document investigations against political officials before a strong case was developed, they would be reluctant to get involved in the investigation. Experiences in the early 1970's in Seattle made this problem apparent. The concerned citizens and the City Council members agreed that the ordinance would be more credible in the public's eyes if this potential problem was resolved.

c) The final sentence of II, that "Nothing in this ordinance shall restrict or forbid departmental personnel from complying with a court order." reflects the recognition that certain court orders such as grand jury secrecy orders or search warrants may supersede requirements of the ordinance.

### III. Handling Private Sexual Information - Sections 11-12.

This was one of two major substantive areas addressed in the ordinance with respect to subject matter of the information collected. When the serious drafting of the current ordinance began in earnest in 1978, the original proposal was to treat Private Sexual Information and Restricted Information the same, i.e., require written authorizations, etc. The police and prosecutors argued successfully that there were few if any actual abuses by the local police in this area. It was further argued that to require the administrative burdens associated with authorization procedures could overwhelm the department in light of the number of sex crimes and sexually related offenses investigated by the department. The solution adopted reflected the various concerns. Area III of the ordinance basically states that Private Sexual Information can only be collected when there is a specific nexus to criminal activity involving sexual matters. No authorization is needed, but none can be obtained either to collect information in this area for other purposes.

### IV. Handling Restricted Information for Criminal Investigation.

This was the main area of concern in the legislation. The controls, procedures, safeguards, and prohibitions mostly revolve around attempts to absolutely prevent police abuses from occurring in the future in political/religious areas.

Section 13 provides for the authorization procedure, which in Ordinance 108333 always has some connection to restricted information. All of the groups participating in the legislative process agreed that, for the most part, restricted information should only be collected when there is a nexus to criminal activity. The concerned citizens, and ultimately the City Council set up an authorization procedure to create a detailed paper trail to completely control and examine the collection of information in this area. Control of informants and infiltrators are also mentioned here and to that extent, the scope and approach of Ordinance 108333 and H.R. 5030 are similar.

Section 15 provides for Additional Authorizations. There were strong arguments made that only a limited period should be allowed to collect restricted information, with no possibility of renewal. The concern of some was that several years after a political event occurred, information might still be collected by police under a pretense of investigating criminal activity. Ultimately the Council decided that requiring new authorizations based on new information provides safeguards.

Sections 17 and 18. Receipt and Transmission of restricted information. Some concerned citizens feared that the police department could circumvent the ordinance by transferring information to other police agencies, or engaging them to collect information it could not collect itself. These sections prevent these possibilities. Some

balance was struck, however, by recognizing that it would be unrealistic for Seattle Police to control information it properly gave out after it left Seattle Police control.

V. Handling Restricted Information For Protecting Dignitaries.

This whole area was especially difficult to draft.

Historically, some police agencies may have used the pretense of dignitary protection to collect and maintain information on all dissident political groups. Dignitary protection is also one area of legitimate police work that does not necessarily require an actual crime to initiate the police function.

The ultimate compromise solution was to set up a separate authorization procedure, require that files be kept separate from other police investigative files, with restricted access to those files. Strict time limits for collection and purging of information were set. One of the unknown areas of the operation of Ordinance 108333 is whether or not the local police will be able to cooperate with federal agencies to provide adequate dignitary protection. Another decision would require the local police to commence information gathering virtually anew for each visiting dignitary with certain specific exceptions. This entire area reflect the concern that an ordinance be written that would prevent all possible ways of improperly collecting certain types of information by all police personnel.

## VI. Police Operations.

This area specifically deals with various police practices and techniques. In many respects it reflects input and direction from H.R. 5030.

In Section 23 dealing with Infiltrators, the polar positions ranged from no use of infiltrators at all in political/religious areas to no special controls. The resulting legislation was a compromise. It would allow local law enforcement to receive ongoing information from individuals within criminal groups about specific criminal activities. It would require special authorization by the Chief of Police if the information sought to be collected was restricted.

Section 26. Prohibited Activities relates to certain prohibited practices for all police personnel in all police activities. Although it was felt by some that this area would be better as the subject of separate legislation, it was ultimately included in the ordinance. Section 26(a) again reflects an example of the ordinance approach of stating the broad principle and then carrying out necessary exceptions for effective and noncontroversial law enforcement practices. Thus, in Section 26(a) local police can still pose as decoys to lure would be muggers.

Section 26(b) communication of false or derogatory information carves out similar exceptions. A prosecutor could not normally impeach without using derogatory information. A police officer may need to communicate false information to foil a crime.

### Section 27. Powers and Functions (of the Police

Intelligence Unit). What was at one time meant to be the whole ordinance is now one small section. Ironically, there was little discussion or dispute about this section. The Mayor and certain concerned citizens felt that all of the police departments information gathering functions and techniques had to be addressed to prevent possible abuses of "police spying." The history of ordinance reflects this concern.

### VII. Auditing and Notice Requirements.

The need to try to guarantee police compliance with the dictates of the ordinance permeated the hearings and drafting sessions from the start. Several approaches were favored by different groups to accomplish this goal. The approach favored by several concerned citizens was to require the police to notify in writing all subjects who had restricted information collected about themselves. It was felt that the Freedom of Information Act and Public Disclosure Laws would then insure that the police collected restricted information only for legitimate reasons and by legitimate methods. The police were concerned that this would require an overwhelming amount of paperwork, and might also tip off subjects of pending investigations. An adjunct to the notification concept was to create civil causes of action with liquidated damages to encourage law suits. This, it was felt would make police very reluctant to collect restricted information. A final mechanism would be an auditor to check

all files and records to make sure notices were going out. The final ordinance does require notification to subjects of collected restricted information, but only where the auditor believes that a substantial violation of the ordinance has occurred.

Another approach suggested was the independent auditor and no notification. This was offered as a lessor of evils (from an administrative-work-cost-security point of view) by prosecutors. Police would not have time to do police work if they were overwhelmed by paper work. Notifying one subject might tip off other subjects and damage investigations as well as jeopardize informants and infiltrators. In reality, what the ordinance ultimately provided for was an independent auditor and some limited notice.

The police and prosecutors do have some concerns and fears about an independent auditor who has access to all police files and records. The police are concerned with protecting the identity of informants. Even though the auditor is sworn to secrecy by the ordinance, there is the fear that inadvertent leaks could occur. There is also the fear that informants might be less willing to cooperate if they believe non police personnel might have access to their identities. This fear is speculative at this time. There is also the fear that other police agencies will no longer agree to cooperate or share information with Seattle police. This has happened so far in one instance although any widespread effect or problem is speculative at this time.

Section 30. Limitations on the Auditor was a legislative attempt to address some of the concerns relating to the integrity of police files with an independent auditor. Section 30(e) was especially written to address the concerns of the prosecutor in certain especially sensitive areas. The King County Prosecutor will take a wait and see approach at this time. One possibility is that the King County Prosecutor might use its own investigators instead of Seattle police in certain sensitive areas.

Among the alternatives to an independent auditor that were discussed was the possibility that the county prosecutor might perform the audits. This possibility was rejected. As an independently elected official with a well defined function, he felt uncomfortable with the role. The possibility might also occur that the police might have need to investigate the prosecutor. The City Attorney also felt uncomfortable with the role as he might be called upon to defend the City in a lawsuit arising out of violation of the ordinance. It was decided that the Mayor, who under City Charter is the superior of the Police Chief, lacked the staff, and the time to effectively monitor compliance with the ordinance.

The problems and concerns at the local level in Seattle may not be such a problem at the federal level. Notification of violations to injured parties might not be a problem if the proposed FBI Charter negates civil liability. Moreover, the FBI Director acts "under the general supervision and

direction of the Attorney General," Sections 532, 532a, 532b. The Attorney General has the position, the prestige and the staff to audit compliance. The reason prompting establishment of an auditor under Ordinance 108333 may not pertain with the proposed FBI Charter. Audit by the Attorney General might also satisfy some concerns with protecting the identity of informants and the integrity of investigative files.

#### VIII. Civil Liability Enforcement and Penalties.

This is another major area of the ordinance which ultimately reflects a balancing of many concerns. Originally, criminal penalties for violations of the ordinance were strongly favored by some. They were ultimately rejected in favor of civil penalties and administrative sanctions.

The civil liability section may prove the most expensive to the City due to the costs of preparing for and defending lawsuits, regardless of their outcome. It was the decision of the elected City Council that civil liabilities were a proper expenditure of public funds and the ordinance reflects this decision. Attached to this document are excerpts of memoranda written by members of the Seattle City Attorney's office to the drafting committee and the City Council elaborating on some of the above arguments in greater detail.

While the proposed FBI Charter in Section 537 provides for Civil Fines against employees "intentionally" using a sensitive investigative technique "knowing that such use

violates the provisions" of the Charter, Section 537a negates civil remedies and denies a court the power to suppress evidence secured in violation of the FBI Charter. Ordinance 108333 provides for disciplinary employment sanctions authorized by the City Charter -- suspension, discharge, etc. -- and a civil action against the City (Sections 37, 33); it negates any civil action against an officer individually for any action or omission made in good faith in the scope and course of his or her duties. Two predominant reasons were given for establishing a civil cause of action against the City:

- (i) It provides a recompense to the injured party;
- (ii) It provides an ancillary method of enforcement by the citizenry. The Auditor, established by Section 29, provides notice to persons who may be the subject of a violation of the ordinance. An aggrieved party may then sue with a minimum amount set as liquidated damages. Such lawsuits will bring violations to the attention of city officials and through the press, to the public.

Ordinance 108333 precluded an action against an officer, personally, when acting in good faith, because:

- (i) The Seattle Police Officers Guild were strongly opposed to personal liability. The City provides "false arrest and other perils" insurance for police officers and it indemnifies city employees who may be sued on account of actions taken in the scope and course of their city duties in good faith. The Police Guild argued that to

create a lawsuit against a policeman or detective individually but deny indemnification would single them out.

- (ii) There is a feeling that violations occurring when an officer acts in good faith are the responsibility of the City more than the individual officer. The Police Department is organized in a para-military manner with a large degree of control in supervisory officers. The Department generally trains its own personnel. It sets up the policies and procedures and may build in checks to make sure its policies and rules are followed. A violation reflects in part the system and in part mismanagement as well as dereliction by the officer involved.
- (iii) The ordinance has latent ambiguities and indefiniteness associated with general concepts. Lawsuits clarify matters, but in the process, impose sometimes a retroactive assessment. When an officer acts in good faith, there is an unfairness in subjecting his personal assets (the family home, his car and the savings account for the kid's education) to the risk of loss.
- (iv) The job penalties authorized by the City Charter -- reprimand, demotion, suspension, or discharge -- are an effective sanction. The City's collective bargaining agreement with the Police Guild and the civil service system provided in the City Charter do not provide for fines as a discipline for malfeasance.

(v) An officer wilfully violating the ordinance abuses his office and may be subject to criminal penalty under state law prohibiting abuse of office, and to the remedies under the Federal Civil Rights Acts, 23 USC § 1981, 1983.

(vi) Section 33 also limits civil liability to "injuries proximately caused by departmental personnel wilfully in the scope and course of their duties." (emphasis added.) It was felt that state law prohibited the expenditure of city monies for ultra vires acts.

Moreover, Seattle Police Officers try to comply with the law. It's appropriate to introduce new legislation on the assumption the police will obey under the same sanctions as other City employees and let events test the hypothesis. There is also a risk that the Washington Supreme Court may exclude evidence in criminal cases procured in violation of a city ordinance -- the issue has not yet been definitely presented and ruled upon.

Our office opposed civil liability. We argued that:

- (i) Civil liability diverts funds from other municipal endeavors -- such as police or fire protection, parks, streets, and social services;
- (ii) Civil liability is rarely imposed for misperformance, non-performance, etc. of an employment duty. The City's duties to the public at large -- such as providing education -- are not by their nature private obligations; the same applies to law enforcement and maintenance of

police records or techniques of investigation. The common law and federal statutes establish various prohibitions and a cause of action arises for transgressing them; if the City establishes a higher standard of conduct for its own officers, the beneficiary should be the public generally rather than any particular individual. (This argument prevailed to a limited extent with respect to internal controls and administration, see the 4th Whereas clause);

- (iii) Civil liability is rather expensive way to secure compliance. Lawsuits are cumbersome, time-consuming, generate massive paper flows, and often respond to situation or practice out-dated by the time the complaint is filed. The amount of recompense to an injured party is only a portion of the total cost. The total cost includes court costs, amounts paid plaintiff's attorneys, defense costs, and fees paid for witnesses and discovery. Equivalent sums spent on education and monitoring might have prevented incidents generating lawsuits.

The most effective enforcement mechanism providing for accountability may prove to be departmental administrative sanctions, Section 37. As police officers are almost always career oriented, the possible dismissal from the department is a much greater deterrent than would face most ordinary citizens. As long as criminal penalties are not provided, under the local rules and ordinances of Seattle, a police

officer can be required to provide statements as to his or her involvement with violations of department rules, or be subject to sanctions. Were criminal penalties to be imposed, Fifth Amendment rights of the officer would preclude this possibility.

This concludes comments concerning the development of actual sections of Ordinance 108333. Two additional areas of comment remain.

Chairman Don Edwards requested comment on the effect the ordinance might have on law enforcement in Seattle. It might best be said that, at this time, there is every indication that the police will respond in a professional manner to do their best to work within the dictates of the ordinance. Attached to this document are articles which recently appeared in the Seattle Police Journal (Attachment 2.) The articles are the most up to date public statements of their concerns.

Although the police concerns can best be expressed by themselves, I will attempt to indicate my understanding of those concerns. It should be noted that much of this is speculative as no other major metropolitan police department has previously operated under such a broad ordinance.

Perhaps most importantly the ordinance may leave the department at a disadvantage in dealing with those types of criminal and terrorist activities that are hidden behind

the mantle of political or religious groups. Police have a very strong concern for and identification with the victims of violent crime. There is fear and frustration that they may not be able to provide adequate protection. The ordinance forces police to react to crimes that are in the process of being committed or have already been committed. They may be unable to seek out political terrorist activities before they occur. The ordinance requires that the police cannot infiltrate or receive information pertaining to restricted areas unless there is already a reasonable suspicion that specific criminal activity will occur. By the time the crime has occurred, and innocent people injured, it is much too late to begin to attempt to infiltrate or develop information about the "so-called" political group responsible for the crime.

There are some fears that informant cooperation with the department will be chilled. Informants, as thought of in the traditional sense, fear exposure that could lead to their injury or deaths. The ordinance would require individuals outside of the police department to have access to most files and records. There is an attempt in the ordinance in Section 7(d) to protect the identity of informants. Whether or not they will appreciate this subtlety remains to be seen.

There are additional concerns that other police departments will no longer exchange intelligence information with Seattle. This information may be important in tracking and fighting

far ranging organized crime or terrorist activities. At least one other police department has already expressed this view. Their perception is that intelligence information is made available to non police personnel and its integrity cannot therefore be insured.

The ordinance is extremely complex. Experienced attorneys and jurists will disagree as to the meaning of different sections. Every person working in the department will be bound by the ordinance. All police investigative units will be impacted, not just the "so-called" police intelligence unit. The training costs and efforts will be substantial.

The administrative burdens appear extreme whenever investigations lead into political and religious areas. The burdens, although costly and time consuming, will be born by the department. It is hoped that thorough investigation into criminal activity touching political or religious activity will not be shunned or hampered by officers unwilling to involve themselves with these burdens and possible sanctions.

We have one final concern as relates to the possible effects of H.R. 5030 on Seattle law enforcement efforts. Section 537b of H.R. 5030 - Improper Dissemination of Records - should consider taking into account the fact that Washington and many other states have public disclosure laws that allow citizens access to governmental records, e.g., RCW Chapter

42.17. Citizens have taken the Chief of Police and the City to court and secured a rather extensive disclosure of police files. The City's disclosures were then made in compliance with a court order. Since exchange of information with the FBI is essential to effective local law enforcement, provisions should be made in Section 537(b) of H.R. 5030 for providing the local law enforcement agency a hearing before exchange agreements are abrogated by the FBI. Ordinance 108333 through the notification procedure may stimulate more public disclosure lawsuits involving the City. It might be appropriate for the FBI to become conversant with the accessibility under law of police records in the various states and transmit only such information as it would allow to be disclosed. To accommodate that alternative the language of Section 537(b) might add "or withhold certain types of information" before "if" in the third line.

We appreciate the opportunity to provide information to the Committee. We hope that it will be of some assistance and stand ready to provide additional comment upon request.

## ATTACHMENT I

## LEGAL - DRAFTING ANALYSIS

This memorandum addresses four legal issues and concludes with some over-all commentary about the proposed ordinance and its approach. Its conclusions are respectively:

- (a) The proposed City civil liability for "wilful and malicious" acts in violation of its provisions is invalid;
- (b) ~~The City has no power to legislate rules of evidence for courts;~~
- (c) ~~The City has a duty to exercise reasonable care in providing police protection for those to whom it owes or has promised personal security services. The provisions in the ordinance relating to dignitary protection raise issues as to the City's ability to fulfill that obligation;~~
- (d) ~~State v. Wright, 87 Wn.2d 783 (1976), makes a procedure for preserving evidence valuable~~

Concluding commentaries provide some basic observations about the ordinance, its approach, its degree of detail, and its draftsmanship.

## (A) The Proposed City Civil Liability

In our opinion, Section 28 exceeds the City's authority insofar as it purports to create a City Liability for acts that were done by "departmental personnel" for private motives without furthering a municipal law enforcement purpose. Section 28 negates civil liability "... except for persons who are injured by departmental personnel wilfully and maliciously violating the provisions of Section 22 of this ordinance." Section 22 prohibits departmental personnel (police officers and paid agents) from inciting any person to commit unlawful violent activity, communicating information known "or a reasonable person should have known" to be false for the purpose of disrupting lawful political or religious activity, and communicating derogatory information outside of a court proceeding for the purpose of discrediting any person without a valid law enforcement purpose. Section 28 defines the term "maliciously" to mean "... an evil intent, wish or design to vex, annoy or injure another person."

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By its nature, the proposed City civil liability contains a "Catch-22" by first becoming effective when substantive principles of law preclude its operation. The City assumes civil liability only when a police officer or paid agent commits an intentional wrong with a malicious intent. Yet, the legal principles controlling tort liability of a municipality for acts of its employees, the doctrine of *ultra vires*, and public purpose concepts controlling indemnification and reimbursement of municipal employees -- all -- reflect and reinforce a basic concept that a public official, who uses his or her position to further a purely personal gain, stands as a private citizen and not as a municipal employee.

At common law, a city, as an employer, is liable under the doctrine of respondeat superior for the tortious acts or omissions of its employees in the scope and course of their employment:

"One is responsible not only for his own acts, but for the acts of his employee when the acts are done in the scope of the employment and in furtherance of the business that is entrusted to the employee; and so long as the thing the servant is doing is in furtherance of the master's business, the master must answer for the unlawful manner in which the act is done." Westerland v. Argonaut Grill, 185 Wash. 411 (1936), quoted in Hein v. Chrysler Corp., 45 Wn.2d 586, 600 (1954).

An employer is not liable when an employee steps aside from his employer's business and acts wilfully and for his own purposes, Brazier v. Betts, 8 Wn.2d 549 (1941). 1 Restatement of the Law Second Agency 2d § 235 indicates that the intent of the employee performing the act is determinative:

"An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which his is employed.

\* \* \* \*

"Comment a . . . The rule stated in this Section applies although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily,

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his intent can be determined. If therefore, the servant does the very act directed, or does the kind of act which he is authorized to perform within working hours and at an authorized place, there is an inference that he is acting within the scope of employment."

In Kyreacos v. Smith, 89 Wn.2d 425, 430 (1977), the Washington Supreme Court ruled that Detective David Smith was acting outside the scope and course of his employment as a Seattle Police Officer when he murdered Nicholas Kyreacos and that the City could not be held liable as his employer. Cases from other jurisdictions have reached similar conclusions when police officers commit heinous crimes or deliberate torts, e.g. Snell v. Murray, 121 N.J. 215, 296 Atl. 2d 538 (1972) (shooting during robbery in a "friendly dice game"); Nelson v. Nuccio, 13 Ill. App. 2d 261, 268 N.E. 2d 543 (1971) (threats followed by murder; giving false report creating emotional distress); Charles v. Town of Jeanerette, Inc., -- La.App. -- 234 So.2d 794 (1970) (killing after pursuit on a speeding ticket); Chapman v. The City of Reno, 85 Nev. 365, 455 P.2d 618 (1969) (slander and interference with business relationships by current husband about wife's former husband); cf. Schulman v. City of Cleveland, 30 Ohio St. 2nd. 196, 283 N.E. 2d 175 (1972) (assault and malicious prosecution by assistant city attorney to vent spleen against opposing counsel).

Under the doctrine of ultra vires, a city or county is not liable for actions outside the scope of its municipal authority where the city or county has no authority to act at all, Papac v. Montesano, 49 Wn.2d 484 (1956). The defense does not apply to actions that are merely an irregular exercise of powers by a governmental official, Haslund v. Seattle, 86 Wn.2d 607, 622 (1976) (invalid issuance of a building permit in violation of ordinance); Fordney v. King County, 9 Wn.2d 546 (1941) (damaging of building mistakenly believed to be on county property). In Commercial Electric Light & Power Co. v. Tacoma, 20 Wash. 298, 291 (1898), the Mayor, a force of men from the City's electrical department and some policemen tore down a competing utility's wires during the nighttime and destroyed them. The Washington Supreme Court held that the City of Tacoma could be held liable for the unauthorized and unlawful acts since the actions were done with bona fides under a color of office in pursuance of a general authority to act for the city and impliedly ratified.

Under the case law, a municipality may reimburse a police officer and participate in defending him against liability for actions done in performance of his official duties when the officer is acting in good faith in a matter

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in which the municipality has an interest. 3 McQuillin, Municipal Corporations (3rd Ed. Revised - 1973) 576-577, § 12.187 states the test as follows:

The true test in all such cases is, did the act done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights or property, or the right or property of the citizens which the officer was charged with a duty to protect or defend? It has been said that in order to justify the expenditure of money by a municipal corporation in the indemnity of one or any of its officers for a loss incurred in the discharge of their official duty, three things must appear. First, the officer must have been acting in a matter in which the corporation had an interest. Second, he must have been acting in discharge of a duty imposed or authorized by law. And third, he must have acted in good faith. But municipal officials who have been adjudged guilty of contempt of court in violating a court order, cannot be said to be acting in good faith nor in the bona fide discharge of their duties.

An opinion of the Attorney General, 1961-62 AGO No. 71, states that a city may not expend municipal funds "... to defend officers or employees of a city in civil suits for private torts or in prosecutions for crime or official misconduct."

In creating a liability intended to be paid from public funds, a municipality exercises its fiscal powers. Where the constitutional grant of powers under Article XI, § 11 to enact police and sanitary regulations does not apply, a grant of authority from the state, express or implied, and a municipal purpose for the expenditure must be shown, Massie v. Brown, 84 Wn.2d 490 (1974); State ex rel. National Bank of Tacoma v. Tacoma, 97 Wash. 190 (1917); 2 McQuillin, Municipal Corporations (1966 Rev. Vol.) § 10.09 et seq.; Article IV, § 19 of the City Charter cf. State ex rel. Collier v. Yelle, 9 Wn.2d 317 (1941); State ex rel. Spring Water Co. v. Monroe, 40 Wash. 545 (1905); Pacific First Federal Savings and Loan Assoc. v. Pierce County, 27 Wn.2d 347 (1947). Inciting another to unlawful violent activity, communicating information known to be false, and slandering another without cause seem by their nature to be private activities of the malefactor. This characterization is reinforced when a public officer commits such actions, wilfully and maliciously, disregarding--or perhaps in defiance of--his law enforcement responsibilities. The actor's public office serves merely to provide an opportunity for his private activities. The relation of his actions to his public duties and any moral obligations of the municipality to account for his derelictions dissipate. A city has no

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express power to provide compensation or make restitution for certain selected private torts disassociated from the performance of municipal functions. While there are no direct precedents, no granted power by implication authorizes expenditures to victims of torts by individuals holding public office or employment outside the scope of their duties. Our opinion upon the invalidity of the foregoing provision therefore follows.

(B) Legislating Rules Of Evidence

Section 23 of the proposed ordinance directs the Chief of Police to promulgate rules and regulations controlling the use of "covert investigative techniques" and then declares that violation of the rules or regulations should not affect the use in court of the evidence obtained. It provides, in part, as follows:

"No courts shall have jurisdiction to consider a claim or to entertain a motion to suppress evidence, quash a subpoena, or dismiss an indictment based on an alleged failure to follow the departmental rules and regulations promulgated pursuant to this ordinance."

Our letter to you, dated December, 1978, had advised that the "exclusionary rule" which forbids the admission in criminal cases of evidence obtained in violation of law, may apply to evidence collected in violation of the ordinance. The language of Section 23 exceeds the City's powers Massie v. Brown, 84 Wn.2d 490, 491-493 (1974); In re Cloherty, 2 Wash. 137 (1891); State ex rel. Fawcett v. Superior Court, 14 Wash. 604 (1896); Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 413-420 (1936).

In Spokane v. J-R Distributors, 90 Wn.2d 722, 727-728 (1978), the Washington Supreme Court declared unconstitutional a Spokane City Ordinance which tied to establish special procedures, rules of evidence and remedies to be applied in the superior court. the Court's opinion states, in part, as follows:

"It is true that within its sphere, a city's power to enact police power regulations is extensive. See, e.g., Pestel, Inc. v. County of King, 77 Wn.2d 144, 459 P.2d 937 (1969). Nonetheless, it is generally agreed that the power does not extend to matters of judicial practice and procedure. 6 E. McQuillin, The Law of Municipal Corporations, §§ 22.15, 24.46 (3d rev. ed. 1969); 1 C. Antieau, Municipal Corporation Law § 3.35 (1978); 3 C. Antieau, Municipal Corporation Law § 26.10 (1978); 62 C.J.S. Municipal Corporations § 288 (1949); and cases cited.

## ATTACHMENT II

## CHIEF'S MESSAGE

Shortly after my arrival in Seattle, I was introduced to the text of a newly proposed ordinance directed at controlling the collection and dissemination of police intelligence information. Police intelligence within the City of Seattle, as most of you know, has been an issue since late 1974. Publicity and controversy surrounding the intelligence gathering methods and infiltration tactics of federal law enforcement agencies did not help the local issues.

It was obvious that Seattle was going to get an ordinance of some type aimed at the intelligence gathering process of the Seattle Police Department. One of my first tasks was to take a close look at the newly proposed intelligence ordinance to see if the police department could live with the restrictions contained therein. The initial answer was a resounding "No." In conjunction with the King County Prosecuting Attorney's Office, the City Attorney's office, the Coalition on Government Spying, and members of the police department, the ordinance was redrafted in such a way that it answered the concerns of those who feared a threat to their privacy through uncontrolled police activity. At the same time it is expected to provide the police latitude to gather information necessary to carry out their law enforcement responsibilities.

This new ordinance covers all police personnel, sworn and civilian alike and has a broad focus on daily operating circumstances. Because of the automatic civil penalties built into the ordinance and the possibility of administrative discipline that could be levied on individual members of the department for violations, I feel that it is important for very member of the department to understand the definitions and restrictions laid out within this ordinance. Consequently, I have directed the Training Division to prepare a program that will thoroughly acquaint everyone on the department with the nuances of gathering, storing and the retrieval of information by police department personnel. This training will commence in mid-September and continue until everyone has had a chance to go through the program. It is anticipated that the program will require two training days for each officer.

I am aware that this training will pose scheduling problems resulting in some disruptions of regular police activity and will require the full cooperation and forbearance of everyone involved until the task is completed. All other major in-service training programs have been suspended for the time being and will be handled on a lower priority basis until this project is finished.

## SEATTLE'S NEW INTELLIGENCE ORDINANCE: AN OVERVIEW

(By Leo Poort)

## HISTORY LEADING TO THE DEVELOPMENT OF AN ORDINANCE

Before 1975, the task of controlling what information went into an intelligence file was a matter of Department Policy and Procedure and depended on the good judgement of the investigator and the review of his commander. Most police departments throughout the United States relied on fairly simple devices to get the job done.

Prior to 1975, processing intelligence information was administratively easy to control: 1. what and how information was collected; 2. how it was kept; 3. who could see it; and 4. when it was purged. But then things began to change rapidly. In 1975, the Seattle City Council perceived a "crisis" in the need to protect the right of privacy of individuals who were previously legitimate subjects of police inquiry.

This "crisis" was heightened by the fact that, in Congress, the Senate Select Intelligence Committee began releasing reports on intelligence community abuses at the federal level. The Senate Committee chronicled federal government-sanctioned spying on thousands of citizens who held unpopular views, disruption of political organizations, and additional stories which made up the "parade of horrors" cited by the A.C.L.U. and others as the need for new controls on intelligence agencies. (Crime Control Digest August 20, 1979, page 5.) In particular, these abuses which are often cited became the main thrust of arguments for a new F.B.I. Charter. Locally, it became the impetus for a legislative answer to abuses perceived by the Mayor and City Council to exist in this department's collection of intelligence information.

An additional factor locally was that SPD's former chief, R. L. Hanson, testified in 1974 at his confirmation hearings that he purged, without notice, some 100 or more Seattle Police Department Intelligence files—this move was viewed by SPD critics as part of an effort to avoid embarrassment of public scrutiny of the contents of those files. None of the critics apparently were willing to recognize the fact that local police protection of dignitaries (or other targets of crime) provides a legitimate basis for the inclusion of prominent persons' names being included in an intelligence file.

Ironically, a number of people wrote to the Department under the state's Public Disclosure Law to find out whether or not they were mentioned in our intelligence files. Many were disappointed to find out that SPD records made no mention of them despite their professed extensive involvement in community affairs.

#### AN EARLY ATTEMPT AT DRAFTING INTELLIGENCE POLICY

In January, 1976, Chief Hanson appointed a "Blue Ribbon Committee" to make recommendations on an intelligence policy to the Mayor and City Council. The Committee made its report on April 19, 1976 to Mayor Uhlman. The report, which was designed to establish an intelligence policy which would meet the stated concerns of the City Council with regard to restrictions and limitations on intelligence gathering and dissemination, included a mechanism for inspecting records to insure compliance with the suggested policy. The report recommended the establishment of an auditor system, using the King County Prosecutor and the State Auditor to conduct semi-annual inspections of SPD intelligence files and records.

Other than the adoption of the concept of an auditor in the new Ordinance which was finally adopted on July 2, 1979, the approach of the "Blue Ribbon Committee" (submitted to the Council on October 5, 1976) was completely set aside when Mayor Royer submitted his draft ordinance early in 1978. Submission of his draft to the Council fulfilled in part a commitment the Mayor made during his 1977 campaign for office.

#### DEVELOPMENT OF AN ORDINANCE

In March, 1978, Mayor Royer submitted a draft ordinance proposal to the City Council which was to be the basis for establishing intelligence policy for the Department. However, it did more than establish policy. It provided for criminal penalties against members of the police department if the ordinance were violated. It provided for notice to all persons who were the subject of department investigation. It stated that SPD could not give information to other agencies without a written agreement from them that they would abide by the terms of Seattle's ordinance.

Later drafts during 1978 and early 1979 eliminated the provisions mentioned above, but still made the collection of information by other units outside the Intelligence Section subject to all of the provisions of the ordinance. In this sense, the ordinance was still very broad—too broad in the view of the department which wanted a policy for guidance to the Intelligence Unit (a small number of investigators) and got a department-wide blanket affecting, instead, every unit in the Department.

Credit for eliminating some of the overreaching provisions and for narrowing the focus of the draft ordinance, originally submitted by the Mayor in March, 1978, goes to the efforts of two new political forces on the law enforcement scene. After Chief Patrick S. Fitzsimons of the Seattle Police Department and new King County Prosecutor Norm Maleng entered into the discussions, the scope of the Ordinance became much more realistic. Their valuable input, the hard work and guidance of City Attorney Douglas Jewett and his staff, as well as the cooperation of Mayor Royer during the early part of 1979, was critical. As a result of their combined efforts, a letter was sent to the City Council by Mayor Royer on April 20, 1979 recommending a much improved and more workable ordinance than was originally proposed.

#### THE DEBATE: TOTAL PRIVACY VS. LEGITIMATE LAW ENFORCEMENT

In the debate which occurred (1978-79) during the drafting of SPD's Intelligence Ordinance, the questions of whether persons were suspects, victims or witnesses to criminal conduct, and whether or not a crime had been committed became critical factors in the determination of what information could be legitimately collected about an individual and placed into police files.

Another question became the subject of extended debate and centered around the type of activity which would be permitted to be the subject of legitimate police investigation—especially political activity, religious activity and sexual activity. With the exception of sexual activity, which is protected elsewhere in law as a right of privacy, political and religious activities are already protected by the First Amendment to the U.S. Constitution. Advocates for "total privacy" felt that a person should not be part of an investigation file if they are described as being engaged in religious, political, or sexual activity when they are merely victims, witnesses or other than primary suspects in a criminal investigation. Additionally, the advocates felt that anytime such activity became part of an investigation, the investigators should go through a complicated authorization procedure in order to document the fact that the information collected was related to the commission of a crime. According to the advocates for total privacy, once an investigation is completed, the subjects of every investigation (where protected activities are included in the report) should be notified by mail that they are mentioned in a police report. Notification of all suspects, victims, witnesses and others was argued to be the primary enforcement mechanism that would end investigative abuses by law enforcement. The Department strongly opposed this view.

The department had no difficulty in recognizing the fact that certain First Amendment rights and privacy rights must be protected from government intrusion insofar as it is possible. However, we were concerned that criminal laws be enforced and the rights of victims of crime and potential victims of crimes would not subordinate to the interests of those that advocate "total privacy" under the pretext that all First Amendment activity must be protected from the scrutiny of law enforcement.

In order to find a middle ground which allows law enforcement to do its job, a couple of principles had to be recognized by the drafters of the new ordinance; that legitimate police investigations must involve by their very nature an invasion of privacy, and also that they impact religious and political activities at all points where criminal activity and First Amendment activity cross paths—The police department is not willing to live with the risk of innocent people being injured at times when it could be prevented by police intervention. The Department insists that they be able to take proactive steps in investigating and preventing crime.

#### IMPLEMENTATION OF ORDINANCE 108333

Given the extremely broad nature of Ordinance 108333 in its adopted form, extensive training is essential for all members of the Department in order to avoid the civil and administrative penalties and discipline mandated by the City Council for violation of the Ordinance.

There are some features of the new ordinance which are fundamental to all police work. First, all information collected and retained by the Department must be relevant to criminal activity and a criminal investigation authorized by the Department. The only exceptions to this criminal relevance rule are investigations related to dignitary protection, personnel matters and other investigations necessary to conduct the lawful business of the department.

Beyond the fundamentals of the "relevance to criminal activity" rule, the ordinance bends sharply to offer extraordinary protection to sexual, political and religious activities beyond what is offered by the courts in case law. It is no longer possible to merely collect information of criminal activity and let the courts determine its relevancy to a criminal prosecution. The collection of information must be justified in advance through a Department-authorization procedure whenever information about sexual, political or religious activity is sought before it is collected.

The City Council has been made aware of the negative impact that the complicated authorization procedures could have on the day-to-day operations of the Department. The costs and risks which were identified had to do with additional administrative burdens and the potential for less protection of the public against some serious violent crime and political terrorism which might occur under the guise of legitimate political or religious activity. We should be able to deal with the administrative burden in a professional manner.

In the long run, we will become credible as a professional agency by the compliance with this law, not by what we do to avoid its consequences. While this last statement may seem to be an idealistic theory, about what a law enforcement agency should be, some very realistic consequences will be obtained if an officer illegally collects information in violation of the Ordinance or uses the Ordinance as an excuse not to collect information required to resolve a case. Also there are

some very real consequences to the crime victim (the public) if we "put our feet up" as an agency rather than deal responsibly with the administrative burden of complying with this ordinance.

The bottom line is that we must make the ordinance a part of our investigative routine. Whether the ordinance provides extra protection to the citizens of Seattle as it is contemplated by the council or not, is still a question for history to answer. However, the citizens of Seattle will insist on our (SPD's) best professional efforts to deal with the administrative burden of the Ordinance and do our best to protect them from the consequences of crime and criminals, especially those who would attempt to hide behind the provisions of this ordinance in order to plan and and carry out violent acts in this city.

Although no one is entirely satisfied with the final product because of its scope, length and complexity, every effort was made on behalf of the Department and the citizens of Seattle to maintain the ability of police officers to do their jobs.

Mr. EDWARDS. Ms. Taylor.

### **TESTIMONY OF KATHLEEN TAYLOR, COALITION ON GOVERNMENT SPYING**

Ms. TAYLOR. Thank you, Mr. Chairman and members of the Sub committee on Civil and Constitutional Rights.

I hope the successful experience in Seattle will provide encouragement for you in your efforts to develop an FBI charter.

The essential concept of the Seattle ordinance is that it limits the collection of political and religious information to that about an individual suspected of committing a crime, a victim or witness, and requires that all information collected be relevant to the criminal investigation. I will talk about that focus and about the audit and civil remedy provisions, both of which are crucial for effective oversight and accountability. First, I will say a few words about the role of the Coalition on Government Spying in the legislative process.

The Coalition on Government Spying is an alliance of the Seattle affiliates of the American Civil Liberties Union, the American Friends Service Committee, and the National Lawyers Guild.

We were established in late 1976. Through a lawsuit and extensive research, we have been able to document serious intelligence abuses in Seattle. We have drafted proposals for intelligence controls, and have worked closely with the city in drafting the recently enacted ordinance.

During the past 2 years, the coalition obtained endorsements from over 50 responsible Seattle community organizations for our "Principles for Effective Control of Police Intelligence Activities."

The principles included a ban on political surveillance, strict limitations on the use of informants, limits on dissemination of information to other police agencies, audit provisions, and realistic and enforceable criminal and civil remedies.

The groups which endorsed the principles included the county bar association, labor unions, women's organizations, and good government groups such as the Seattle League of Women Voters.

We did not seek to hamstring law enforcement efforts. We understood the investigating political groups and individuals not suspected of a crime wastes public resources, reduces work against real crime, and invades personal and political privacy.

The kind of public support generated for the Seattle ordinance indicates the potential broad support for strict controls on political information gathering at the Federal level.

In the hundreds of hours of developing the Seattle ordinance, every concern raised by the police department and by the community was addressed. Each side received full opportunity to explain why a certain provision was needed or another one unworkable. The result is a compromise bill, with which we are not fully satisfied, but which strikes a balance between legitimate law enforcement needs and the protection of civil liberties.

Experience has shown even when police do not suspect criminal activity, experience has shown that they have engaged in broad investigations in the belief that they must know everything that is going on in the community. In sworn testimony before the Seattle City Council, a former intelligence commander from the early 1970's described how a typical investigation in those days began:

Somebody was scanning the papers one morning, spotted the name of a group, and said, "What is that?" Somebody else sitting next to him said, "I don't know. Let's find out." And this is the way most of these things started.

The idea that police should examine each new group to see whether "it is good, bad, or indifferent" as the same commander described it, is wholly unacceptable. The FBI charter seems to sanction this broad "let's find out" attitude for preliminary inquiries. The FBI, like the Seattle police, should be prohibited from collecting any political or religious information during a preliminary inquiry. When there is a reasonable suspicion that a crime has been committed, the collection of political information must be limited to the individual crime suspects, and the victim or witness.

We were particularly concerned about limiting the collection of political information because of our experience with a grand jury investigation in Seattle a few years ago.

A local underground group took credit for several bombings, and a Federal grand jury was convened in February 1976.

The Federal Bureau of Investigation, the Seattle Police Department, and the Alcohol, Tobacco and Firearms Division of the Treasury conducted a sweeping investigation of suspected leftists, claiming to be seeking information about the underground group.

Lawful organizations were infiltrated, people were followed, homes were monitored, and garbage was searched.

It was a very inefficient way to search for the criminals and was a serious violation of political and privacy rights. Despite the massive surveillance of innocent people, these tactics provided no information to assist the police in their investigation.

The leader of the underground group was finally apprehended when a Federal agent happened to see him waiting in line at a fast food restaurant.

Similar incidents have occurred in many major cities. Terrorist investigations have too often become a pretext or an excuse for broad political investigations. The abuses by police agencies during that investigation convinced us that the collection of political and religious information must be limited to that about individuals who are suspected of committing crimes.

The Seattle ordinance carefully regulates the collection of such information without impeding the collection of other information.

I certainly agree with Councilman Revelle that to insure effective oversight, accountability, and public trust, citizens need a credible enforcement mechanism in legislation controlling police intelligence activities.

An independent auditor with authority to review police files at random is a crucial segment of the enforcement mechanism. Interestingly, this section of the ordinance was one of the least controversial.

In fact, the police department first suggested the establishment of an independent audit of police intelligence records in 1976 "to insure to the fullest extent possible that no files are being kept which violate the substantive provisions of this policy statement."

The provisions enacted in the ordinance are very similar to this early proposal by the police department.

The concept of an auditor is well established in government and in business. It is a sound management practice. It should be no different for the Federal Bureau of Investigation. The audits must be made frequently enough to provide an effective check on improper practices and broad enough to insure that improper files are not hidden from review.

The Federal Bureau of Investigation has suffered from a much more serious lack of public trust than did the Seattle Police. An independent auditor with unlimited access to files and with responsibility to report substantial violations would be an asset to the Bureau. Unscheduled audits by the General Accounting Office and access to privileged information by congressional committees must be instituted for effective oversight.

The coalition had sought civil and criminal penalties for substantial violations of the ordinance, and a notice provision, which we believe is the most important enforcement mechanism.

The police department wanted none of these, but was particularly opposed to notice and criminal penalties. Finally, only a minimal civil penalty was adopted.

The city council was penurious in establishing the amount of punitive damages and failed to provide attorneys' fees for plaintiffs who recover damages. However, even the limited civil liability in the Seattle ordinance is critical to enforcement.

Seattle's police chief recently demonstrated how the creation of civil liability affects his respect for the new ordinance. In a recent article in the "SPD Journal," he said to his force:

Because of the automatic civil penalties built into the ordinance and the possibility of administrative discipline that could be levied on individual members of the department, I feel it is important for every member of the department to understand the definitions and restrictions laid out within this ordinance.

Consequently, the chief has directed that all police department personnel participate in 14 hours of training in information gathering. The training will reinforce respect for the personal and political rights of Seattle citizens.

We are not fully satisfied with the Seattle ordinance. We would like stronger enforcement mechanisms, stricter penalties, and fewer exceptions, but the controls that were hammered out for the Seattle Police were possible because citizens and public officials understood that traditional American liberties must not be forsaken in attempts to enforce the law.

It is possible to balance the protection of political and privacy rights with the need for effective law enforcement.

In establishing an FBI charter, I urge you to limit the collection of political and religious information and to provide realistic enforcement mechanisms. These provisions will help the Bureau concentrate

on its important tasks and insure that your guidelines are taken seriously now and in the future.

Thank you.

Mr. EDWARDS. Thank you very much, Ms. Taylor, and thank all three witnesses for excellent statements.

The House of Representatives went into session at 10 a.m. There is a vote on the floor. The committee will recess for 10 minutes.

[The complete statement follows:]

**TESTIMONY OF KATHLEEN TAYLOR, COORDINATOR, COALITION ON GOVERNMENT SPYING**

Thank you, Mr. Chairman and Members of the Subcommittee on Civil and Constitutional Rights, for the opportunity to discuss Seattle's police intelligence ordinance.

I hope the successful experience in Seattle will provide encouragement for you in your efforts to develop an FBI charter. Enactment of a charter for the Federal Bureau of Investigation which establishes clear guidelines and effective controls is central to maintaining effective law enforcement and protecting traditional American liberties.

The essential concept of the Seattle ordinance is that it limits the collection of political and religious information to that about an individual suspected of committing a crime, a victim or witness, and requires that all information collected be relevant to the criminal investigation. I will talk about that focus and about the audit and civil remedy provisions, both of which are crucial for effective oversight and accountability. First, I will say a few words about the role of the Coalition on Government Spying in the legislative process.

The Coalition on Government Spying is an alliance of the Seattle affiliates of the American Civil Liberties Union, the American Friends Service Committee, and the National Lawyers Guild. We were established in late 1976. Through a lawsuit and extensive research, we have been able to document serious intelligence abuses in Seattle. We have drafted proposals for intelligence controls, and have worked closely with the City in drafting the recently enacted ordinance.

During the past two years, the Coalition obtained endorsements from over 50 responsible Seattle community organizations for our "Principles for Effective Control of Police Intelligence Activities." The principles included a ban on political surveillance, strict limitations on the use of informants, limits on dissemination of information to other police agencies, audit provisions, and realistic and enforceable criminal and civil remedies. The groups which endorsed the principles included the county bar association, labor unions, women's organizations, and good government groups such as the Seattle League of Women Voters.

We did not seek to hamstring law enforcement efforts. We understood that investigating political groups and individuals not suspected of a crime wastes public resources, reduces work against real crime, and invades personal and political privacy. The kind of public support generated for the Seattle ordinance indicates the potential broad support for strict controls on political information gathering at the federal level.

In the hundreds of hours of developing the Seattle ordinance, every concern raised by the police department and by the community was addressed. Each side received full opportunity to explain why a certain provision was needed or another one unworkable. The result is a compromise bill, with which we are not fully satisfied, but which strikes a balance between legitimate law enforcement needs and the protection of civil liberties.

**FOCUS ON THE INDIVIDUAL**

The essence of the Seattle ordinance is its focus on the individual, rather than the crime, being investigated. The ordinance restricts the collection of information about political and religious activities to the suspect, victim or witness. This concept is not included in the FBI charter, and this Subcommittee should seriously consider it.

In Seattle, reasonable suspicion that a crime has been committed does not give the police license to collect political and religious information about people who are not directly related to the crime. Police must have reasonable suspicion that the person about whom they want to collect political or religious information has committed a crime. Then, a written authorization for the collection is required.

This will make an officer consider the need for collecting the information in the first instance, and will provide an auditable paper trail.

Experience has shown even when police do not suspect criminal activity, experience has shown that they have engaged in broad investigations in the belief that they must know everything that is going on in the community. In sworn testimony before the Seattle City Council, a former intelligence commander from the early 1970s described how a typical investigation in those days began: "Somebody was scanning the papers one morning, spotted the name of a group and said, 'What is that?' Somebody else sitting next to him said, 'I don't know. Let's find out.' And this is the way most of these things started," he said.

The idea that police should examine each new group to see whether "it is good, bad, or indifferent" as the same commander described it, is wholly unacceptable. The FBI charter seems to sanction this broad "let's find out" attitude for preliminary inquiries. The FBI like the Seattle police, should be prohibited from collecting any political or religious information during a preliminary inquiry. When there is a reasonable suspicion that a crime has been committed, the collection of political information must be limited to the individual crime suspects, and the victim or witness.

We were particularly concerned about limiting the collection of political information because of our experience with a grand jury investigation in Seattle a few years ago. A local underground group took credit for several bombings, and a federal grand jury was convened in February 1976. The Federal Bureau of Investigation, the Seattle Police Department, and the Alcohol, Tobacco and Firearms Division of the Treasury conducted a sweeping investigation of suspected leftists, claiming to be seeking information about the underground group. Lawful organizations were infiltrated, people were followed, homes were monitored, and garbage was searched. It was a very inefficient way to search for the criminals and was a serious violation of political and privacy rights. Despite the massive surveillance of innocent people, these tactics provided no information to assist the police in their investigation. The leader of the underground group was finally apprehended when a federal agent happened to see him waiting in line at a fast food restaurant.

Similar incidents have occurred in many major cities. Terrorist investigations have too often become a pretext or an excuse for broad political investigations. The abuses by police agencies during that investigation convinced us that the collection of political and religious information must be limited to that about individuals who are suspected of committing crimes.

The Seattle ordinance carefully regulates the collection of such information without impeding the collection of other information. This way there is no need to distinguish between types of investigations—general, terrorist, or preliminary. All investigations are treated the same. Only when political or religious information is collected does the ordinance go into effect.

#### ENFORCEMENT MECHANISMS

I certainly agree with Councilman Revelle that ensure effective oversight, accountability, and public trust, citizens need a credible enforcement mechanism in legislation controlling police intelligence activities.

An independent auditor with authority to review police files at random is a crucial segment of the enforcement mechanism. Interestingly, this section of the ordinance was one of the least controversial. In fact the police department first suggested the establishment of an independent audit of police intelligence records in 1976 "to insure to the fullest extent possible that no files are being kept which violate the substantive provisions of this policy statement." The provisions enacted in the ordinance are very similar to this early proposal by the police department.

The concept of an auditor is well established in government and in business. It is a sound management practice. It should be no different for the FBI. The audits must be made frequently enough to provide an effective check on improper practices and broad enough to ensure that improper files are not hidden from review.

The Federal Bureau of Investigation has suffered from a much more serious lack of public trust than did the Seattle police. An independent auditor with unlimited access to files and with responsibility to report substantial violations would be an asset to the Bureau. Unscheduled audits by the General Accounting Office and access to privileged information by Congressional committees must be instituted for effective oversight.

The Coalition had sought civil and criminal penalties for substantial violations of the ordinance, and a notice provision, which we believe is the most important enforcement mechanism. The police department wanted none of these but was particularly opposed to notice and criminal penalties. Finally only a minimal civil penalty was adopted.

We had urged that any person on whom political information was collected should be notified within six months after the investigation's completion. The individual then could seek those records under the state public disclosure act to determine whether or not the information had been properly collected. The Coalition believes that notice to the subjects of political information is the ultimate audit. The subjects of the information are best qualified to determine whether or not the information was properly collected.

The notice provisions which we sought were not accepted by the City Council. Instead only if the auditor finds that information has been collected about a person in substantial violation of the ordinance, will the subject be notified. Without the notice provision which we sought, an auditor with full access to files and civil penalties for substantial violations become central to providing effective enforcement. There must be civil sanctions if you are serious about prohibiting improper practices. Internal discipline is not enough.

The City Council was penurious in establishing the amount of punitive damages and failed to provide attorneys fees for plaintiffs who recover damages. However, even the limited civil liability in the Seattle ordinance is critical to enforcement.

Seattle's police chief recently demonstrated how the creation of civil liability affects his respect for the new ordinance. In a recent article in the *SPD Journal* he said to his force:

"Because of the automatic civil penalties built into the ordinance and the possibility of administrative discipline that could be levied on individual members of the department, I feel it is important for every member of the department to understand the definitions and restrictions laid out within this ordinance."

Consequently, the Chief has directed that all police department personnel participate in fourteen hours of training in information gathering. The training will reinforce respect for the personal and political rights of Seattle citizens.

We are not fully satisfied with the Seattle ordinance. We would like stronger enforcement mechanisms, stricter penalties, and fewer exceptions, but the controls that were hammered out for the Seattle police were possible because citizens and public officials understood that traditional American liberties must not be forsaken in attempts to enforce the law. It is possible to balance the protection of political and privacy rights with the need for effective law enforcement.

In establishing an FBI charter, I urge you to limit the collection of political and religious information and to provide realistic enforcement mechanisms. These provisions will help the Bureau concentrate on its important tasks and ensure that your guidelines are taken seriously now and in the future. Thank you

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

We will be operating under the 5-minute rule, and the gentleman from Missouri, Mr. Volkmer, is recognized.

Mr. VOLKMER. Thank you, Mr. Chairman.

The ordinance that we have been discussing pertains basically to collection of restricted information and use of that restricted information. Is that correct? That's the primary purpose of it.

Mr. REVELLE. Yes; essentially, Congressman. There are some other elements of the ordinance, but if you had to pick out the core, that would be it.

Mr. VOLKMER. All right.

Now let's assume—I was concerned a little bit about some things that Mr. Bernstein said, but let's take a little example.

As I read it—and it's kind of hurriedly, it's the first time I have seen it—but let's assume I'm a police officer investigating criminal activity, all right? I find nothing in here that says that I can't ask what political organizations a defendant who has been given all of his rights, et cetera, let's assume all those things, nothing in here that says I can't ask him; is that correct? Do you agree with that?

Mr. REVELLE. You're not prohibited from asking, but if you get beyond——

Mr. VOLKMER. He can tell me, can't he?

Mr. BERNSTEIN. We did decide in the ordinance that if it wasn't written and recorded some place, it really couldn't be——

Mr. VOLKMER. It would have to be in departmental records?

Mr. BERNSTEIN. It would be a departmental record and be controlled.

Mr. VOLKMER. If I want to ask and retain that knowledge and tell the other police officer or do anything else I wanted, I'm not prohibited?

Mr. BERNSTEIN. That is correct. I think it was felt it would be unreasonable to try to control the thought process beyond what was put down in writing.

Mr. VOLKMER. OK.

Now this does not inhibit or prevent a police officer from other investigations into criminal activity, other than the restricted information and sexual information; is that correct?

Mr. REVELLE. That's correct.

Mr. VOLKMER. Use of information is still permissible in those instances?

Ms. TAYLOR. Yes.

Mr. VOLKMER. Burglaries, et cetera, there is no prohibition?

Mr. REVELLE. If it's a burglary and no sexual information or restricted information is involved, the ordinance essentially does not apply.

Mr. BERNSTEIN. One thing that was important to the city attorney's office, the use of certain techniques and practices should not unduly administered in the sense of written processes. It's only when we get into the so-called sensitive area that the ACLU and other concerned citizens were interested.

Mr. VOLKMER. In other words, if I had a political club, and that political club was burglarized, or there was a robbery or anything else, bad checks written on our checking account or anything, they can ascertain during that investigation the list of the members, if it's necessary in order to properly investigate it. Proper or improper?

Mr. BERNSTEIN. They would have to get a written authorization to do so, but they would be able to collect that list.

Mr. VOLKMER. To be honest with you, maybe you've had an experience in Seattle that the rest of us haven't had, but what about the necessity of this type of ordinance?

Mr. REVELLE. Actually, Congressman, I'm not a national expert on police intelligence, but from what I've learned over the last 4 years, there are a number of other cities where abuses of this kind of information have been much greater than in Seattle, and most people I have talked to are much more knowledgeable on this than I. So Seattle has a relatively minor set of problems and abuses, compared to other cities that they have worked with and dealt with.

Mr. VOLKMER. Tell me about some of the abuses. What happened to people as a result of the information that was gathered? How many of them went to jail?

Mr. REVELLE. In terms of getting down to the details on abuses, you will get a number of different perspectives. I'll give you mine, and then Kathleen and Paul can give you theirs.

When the issue arose, the impression that was created in the public mind—and I underline impression—was there was a great deal of illegal police spying and probably wiretapping and all sorts of sinister activities. My impression in talking to a variety of people I dealt with in deciding whether or not the city council should get involved was that while there might have been some of those activities probably most of the problem was an overzealous collection of information from all over the place, relevant or irrelevant to criminal activity.

And maybe the greatest abuse was the waste of public funds and police officer time. This is what a number of very good officers pointed out to me.

Mr. VOLKMER. The information was stuck in the files and never used?

Mr. REVELLE. It was never followed up. They were going out and looking at groups they had no business looking at. A lot of files I cited were collections of newspaper articles and other public documents.

Now at the time there was a great outcry that the council conduct a thorough investigation as to, you know, the extent of the abuses.

Well, the council decided unanimously after talking with the local prosecuting attorney, city attorney, and district attorney, that for us to do that would be absurd. We didn't have the resources or the expertise. If there were anything sinister it would probably be buried so deep we could never find it, and we would come up after this great "grand jury" type of investigation with nothing, or little or nothing.

And what we should do—I'm talking about the city council now, not the prosecutor—what we should do is focus instead on legislation to minimize the future potential for the kinds of abuses about which they were concerned. So that's what we did. The 4-year effort was not a great inquiry into what the abuses were. There was enough there that we felt that legislation was needed and we focused on appropriate legislation.

There was a lawsuit brought by the coalition that did focus on particular files. I will leave that for Kathleen. But from the council's perspective, we did not, and did not feel it necessary, to document a whole array of very bad things.

The general impression we got after looking into it, agreed to by many officers in the department, is the collection and retention of intelligence information was erratic, chaotic, and not very well handled, and it was appropriate for us to be setting policies and guidelines.

I hope that's responsive.

Ms. TAYLOR. I think that Mr. Revelle's statement is very good, and it's a very appropriate answer from the public policy viewpoint.

We did have a lawsuit against the Seattle Police Department, a public disclosure lawsuit. We obtained hundreds of pages of political files. We were able to obtain those files because the Police Department could not show that those files were essential to effective law enforcement. If they had been essential, we wouldn't have been able to obtain them. But since they were political files, we were able to get them under a law similar to the FOI Act.

These showed police officers going to political meetings at which there was no suspicion of crime, collecting information about benefits

that an organization was going to hold, collecting information about lawful rallies, press conferences—all political activities that had nothing to do with any kind of criminal activity.

Some of the information that we obtained was helpful in explaining to the community why there was a need for some control.

However, from a public policy point of view, I think that Mr. Revelle is correct, that it's up to the legislators to establish clear guidelines for the police department in order to insure effective law enforcement while at the same time not allowing basics of liberties to be eroded.

Mr. VOLKMER. My time is up. Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Revelle, you talk about handling private sexual information and the restrictions on it in Seattle. I read recently that Judge Carswell has had a second arrest involvement in a rather public controversy, shall we say, over circumstances which would indicate homosexual activity.

Now would you think, if he were nominated to serve on the Supreme Court, as he was, would you think that in doing a background—first of all, would you authorize a background investigation of someone who is appointed to a sensitive position in the Government?

Mr. REVELLE. Would I?

Mr. HYDE. Yes. Do you think that's a permissible investigatory activity?

Mr. REVELLE. Yes.

Mr. HYDE. You do.

And would you permit the collection of sexual information about that person? Would your ordinance permit?

Mr. REVELLE. There is a difference, Congressman, at least as I see it. When someone puts himself forward to be appointed to a sensitive position, just as when someone runs for public office, they are voluntarily subjecting themselves to more scrutiny than I think the average citizen should be subjected to.

Mr. VOLKMER. Will the gentleman yield?

What about the auditor? What investigation was done on the auditor? That's a sensitive position.

Mr. REVELLE. We will be doing a thorough background check on him, Congressman. We don't have one yet, so we haven't done one.

Mr. VOLKMER. That's one I'd like to know.

Mr. REVELLE. We would do that. The private sexual information—for instance, whether or not the auditor is homosexual—is irrelevant to me. His capacity to be an effective auditor—

Mr. HYDE. What about a judge? Would it be relevant in looking into the background of someone appointed to the Federal bench as they do now, to determine the sexual information, his sexual preferences, or her sexual preferences? Would you think that would be relevant?

Mr. REVELLE. No.

Mr. HYDE. Therefore, we could have Judge Carswell, who has been convicted of soliciting a policeman, we could have him on the bench and never know it because we would never have that information.

Mr. REVELLE. Congressman, your first question asked whether the status of the homosexual should be investigated, and I said I didn't

feel that was relevant. If, in fact, someone is guilty of criminal activity, sexual or not, of course it's relevant.

Mr. HYDE. The sexual proclivities of a man nominated to the U.S. Supreme Court would be proscribed; is that correct? You don't think it's relevant whether this person is a homosexual or not; if he is appointed, that information, if inadvertently discovered in a background investigation, should be discarded and kept from the President or from the confirming Judiciary Committee?

Mr. REVELLE. I wouldn't hide it, but I still don't see the relevance unless you tied it to criminal or other unlawful activity.

Mr. HYDE. OK. I just wanted to know what your views on it were. You are aware of the Carswell situation?

Mr. REVELLE. I'm not.

Mr. BERNSTEIN. Congressman, if I might—under our ordinance, under some certain circumstances, the police would not be able to do the background check. Another agency would have to.

Mr. HYDE. I understand, but we are taking the ordinance as a model for us to follow, and I'm trying to see how the forbidding of collecting sexual information would work. You see, Judge Carswell was arrested and convicted on one occasion, on the day before he was beaten up in his room in Atlanta by a man he picked up, and I just wondered whether that would be useful to know if someone had those proclivities, before they got on the bench—the Supreme Court or any other bench.

Mr. REVELLE. Congressman, if I may, with respect to what you say, at least as I understand what you are saying: You talked about the status of one's sexual preference or homosexuality and jumped to the Carswell situation.

Mr. HYDE. I don't care about the status. I think if a person is a homosexual and has a habit of picking strange people up and that person is going to be appointed to a sensitive post in the Government, in my judgment, that's very important information to know. That would show some aberration—maybe not to you or to whoever supports this—but it would to me and some people that I know, represent aberration. It might be subject to blackmail, that sort of thing.

So I'm just curious to get your rationale as to whether that information ought to be collected and ought to be transmitted.

Mr. EDWARDS. Will you yield?

Wouldn't the question also apply to a heterosexual person who goes around indiscriminately walking the streets and picking up people, too?

Mr. HYDE. Sure, sure. Absolutely.

Mr. REVELLE. If that is criminal or unlawful activity—

Mr. HYDE. It isn't.

Mr. EDWARDS. Is that a criminal activity, walking around trying to pick somebody up?

Mr. BERNSTEIN. Only if it's done for a fee.

Mr. HYDE. Only if it's done for a fee. Well, we'd never know that, would we? We certainly wouldn't monitor their activities, would we? OK.

Now, garbage searches. Isn't garbage abandoned, when you put something in the garbage and you put it out in the alley, aren't you through with it?

Mr. REVELLE. I am. [Laughter.]

Mr. HYDE. Very good. And so you certainly don't think it's wrong if somebody searches what you have abandoned, do you?

Mr. REVELLE. I think they are probably wasting their time, but it doesn't bother me.

Mr. HYDE. How about you?

Ms. TAYLOR. Well, I think there are some questions of privacy in that I think the police department should be looking for information that has to do with criminal activity. In these cases, they were looking for political activity.

Mr. HYDE. Well, OK, but would you think garbage searches ought to be rendered illegal?

Ms. TAYLOR. No; not entirely.

Mr. HYDE. By the way, what if the FBI hired a lot of newspaper reporters? Wouldn't that circumvent all of these restrictions? The paper's rights and all? I mean we certainly protect newspaper reporters. We give them certain leeway. The grand jury minutes show up in columns and things like that, and that's a first amendment right, the people's right to know.

Don't you think if FBI men were also newspaper reporters, that might circumvent some of your—

Ms. TAYLOR. I think the distinction is that the FBI is collecting information in order to prosecute people and reporters are out to gather information for news. I don't think that's the same thing.

Mr. HYDE. No; that's what they're supposed to be doing—but just one last question, with your indulgence:

Don't you think the searching of passengers as they go through an airline terminal is an outrageous invasion of privacy?

Ms. TAYLOR. No, sir.

Mr. HYDE. You don't? Why not? They've committed no crime, have they?

Ms. TAYLOR. No, sir.

Mr. HYDE. Well, my goodness, how do you justify searching the luggage and searching the body of a person who has bought a ticket and is going to fly in an aircraft?

Mr. REVELLE. Congressman, the reason it doesn't bother me is twofold:

First of all, again it's a voluntary submission to a search.

Mr. HYDE. Just a minute. That's not so. You know it isn't voluntary. You don't get through there unless you submit to the search, unless you have a different way of doing it in Seattle. Try it out here at National Airport.

Mr. REVELLE. No search, no fly. You've still got a choice, whereas the kind of activity that is conducted by a police agency doesn't give a person a choice. Second, the search doesn't bother me because it's not a search that I don't know about. It's not somebody spying on me or somebody checking on me, where I have no knowledge. It's done right up front.

Mr. HYDE. But it is an investigation and it has nothing to do with a suspected crime that you have committed; isn't that right?

Ms. TAYLOR. It's not political, either.

Mr. REVELLE. It's not political, and we are not in this ordinance—

Mr. HYDE. Next time around let's discuss politics and who is and who is not political. Were the assassins up in the gallery of the House,

the Puerto Ricans, were they political? Is the IRA, who just assassinated Lord Mountbatten, is it political? Let's get into who is and who is not political.

My time is up. We'll be back.

Mr. REVELLE. My answer is yes, they are.

Mr. HYDE. Who makes that decision? After the bomb goes off?

Ms. TAYLOR. It's described in the ordinance.

Mr. EDWARDS. Would any of the witnesses like to comment before we move to Mr. Ashbrook?

The gentleman from Ohio, Mr. Ashbrook.

Mr. ASHBROOK. It just so happens that's what I was going to ask. If an organization comes to Seattle to have a rally and say, well, the only way you are going to have any progress in this country is through the barrel of a gun, and burn things down, at that point, is that political, Ms. Taylor?

Ms. TAYLOR. Under our ordinance, we can collect information about that group of people, and I think that's an important fact.

Mr. ASHBROOK. After they say it? Before they say it? One, they're suspected; two, the situation I just gave, they have made utterances which might concern a few people there, and up until any time they have taken any activity, I guess that's what I'm wondering about.

Ms. TAYLOR. Yes, sir. If they are reasonably suspected of conspiracy to commit a crime, they can collect any information they want on them, upon obtaining an authorization.

Mr. ASHBROOK. At that point you could have an infiltrator, an informant?

Ms. TAYLOR. If they are reasonably suspected of a crime, they have to get an authorization to collect political information, but they can get it.

Mr. ASHBROOK. So they couldn't collect at that point. I guess we all wonder in legislation what triggers or what point—I think that's one of the problems I have with the restrictions. I think they've gone too far. I think we all agree it's a debatable subject as to what point you can collect. It is a matter of concern to the safety and welfare of Seattle, or the country, or wherever we're talking about, at which point we do these carefully guarded, and most of us believe necessary, but possibly unfortunate thing to start collecting information.

I notice you said something about newspaper files. You didn't think they were of much value in keeping information on these people. Is that the purport of what you said? You were mentioning newspaper files.

I guess the only thing that triggers in my mind—

Mr. REVELLE. Are you talking about me?

Mr. ASHBROOK. Well, one of you. I think about all they were doing was looking at newspaper files on political activities.

Mr. REVELLE. That was me. What I said was newspaper files and other publicly available documents. I was trying to distinguish for the Congressman between the bugging activities and the collection of public records.

Mr. ASHBROOK. You think that is or is not a valid function in your intelligence unit?

Mr. REVELLE. Well, if it's appropriately directed, it's a valid function, but the way in which it's being conducted by the police department, one of the most respected officers in the department who's

been in charge of the unit, was one of those who complained the loudest. It was a waste of everybody's time, collecting files on irrelevant things that weren't being indexed, weren't being used. It was ridiculous.

That didn't come from me. It came from police officers who were tired of wasting their time with irrelevant investigations.

Mr. ASHBROOK. It's my experience in intelligence, what I hear from our legislative oversight, the problem is it's never complete. You never know what's valuable, you never know what will be needed.

I'm thinking of the SLA. When the SLA surfaced, the only thing anyone had, the FBI or anyone, the only thing they had was a few disjointed statements of some of the members. They had very little to put together, but at the time we were very glad they had even that. When you're collecting information, you never really know what value it's going to be. If we all had a crystal ball and knew exactly what was going to become the SLA or what group or what really was going to be a threat, then probably we wouldn't need intelligence or collection of information.

I guess I'm interested in your statement when it says no informant or infiltrator may be used to collect restricted information about a victim or a witness. What is the basis for that being in there? What purpose—it's on page 10.

Mr. REVELLE. Of the ordinance?

Mr. ASHBROOK. Yes.

That's one of the former ways of collecting information which obviously is more and more restrictive, less and less available to the police. They are literally under court order not to have informers or infiltrators unless they are publicly reported on, so we know the trend is against that.

I'm just wondering—

Ms. TAYLOR. This is a victim, a witness, not for someone suspected of a crime. If someone is already—had a crime committed against them, it doesn't seem appropriate to be collecting information about the victim of that crime by using an infiltrator, by using an intrusive technique.

Mr. ASHBROOK. If you have reason to believe the witness was perjured or intimidated, you don't think there would be any reason to get information? Say the witness had been intimidated in the course of the trial or the orderly process of justice appears to have been circumvented because the witness was intimidated or threatened or so forth, you don't think—you don't think you should use an informant?

Ms. TAYLOR. You might be using an informant to collect information about the person suspected of affecting the victim rather than about the victim herself.

Mr. BERNSTEIN. As for the concerns of the prosecutor, we have all needed for information to successfully impeach witnesses. This was a specific area that did concern me in the ordinance, and the other area of concern that you got into a little bit with Ms. Taylor. I think that one of the difficulties with our ordinance is that it makes a group political because they say they are, and there is no ability within the ordinance to distinguish groups who would tend to proceed by conventional democratic means and those groups who would not.

I would disagree with Ms. Taylor that under the ordinance, under your park scenario, if the folks were to come to a park in Seattle, that we could collect information unless it rose to the level of a reasonable suspicion of criminal activity that was about to occur, or was occurring or had occurred.

Reasonable suspicion is a legal term just slightly less than probable cause. At that level I think there's an articulable reason to believe this group should be looked into, but we don't have reasonable suspicion yet, therefore we wouldn't be able to collect this information, because we would not be able to get a written authorization under our ordinance.

Mr. ASHBROOK. In that specific case, you are at least restricted as to your ability to proceed?

Mr. BERNSTEIN. If the police were to come to me and ask me what should we do under those circumstances, in the way you have outlined your example, I'd have to say you're going to run a risk of civil liabilities and administrative penalties if you do it at this point, and that's the one narrow area of the ordinance that I think we could have problems with. I think the day-to-day operations under the ordinance should work just fine.

Mr. ASHBROOK. I know I've extended my time a little bit, so I'll stop.

Mr. EDWARDS. There are several reasons why we want to enact a charter for the FBI. Some of the reasons coincide with your reasons for enacting this ordinance in Seattle, and one of them, of course, is the collection of unauthorized, irrelevant information about political groups, and that was done on a wholesale basis for a number of years.

The subcommittee had a hearing where it was indicated that in 10 field offices, there were 20,000 or 30,000 open files on people and organizations which really hadn't been suspected of committing a crime or planning to commit a crime, and your ordinance is aimed almost specifically at controlling that type of operation. It's a great waste of time, as you pointed out, Mr. Revelle. Is that correct?

Mr. REVELLE. Yes, sir, if I may elaborate. If you have four or five individuals collectively getting together to organize to do a burglary, in that case the way the ordinance is set up, it really doesn't apply. That's just organized criminal activity, no politics involved.

On the other side, we saw that a number of organizations—such as the American Friends, who had no connection that anyone could justify with criminal activity—were the subject of quite a bit of information gathering.

We felt that was obtrusive to the civil rights and liberties of that organization, and it was a waste of Government money because nothing was ever used, it never led to a conviction, there were never any arrests, never anybody protected by it, and we and the police agreed it was kind of stupid.

Then you get to that very difficult, narrow area where you have criminal activity performed by a group that either is or purports to be religious or political, and that's kind of where the focus of the ordinance is—to try to allow investigations of that kind of activity without unduly interfering in the area of religious and political liberty.

And it's tough, because I agree with Paul, there are some groups who simply pull a political or religious shroud over them—not a lot,

but some—and then go about their criminal activity. But we don't prohibit investigations. We just say in those cases, you need to follow certain procedures. We have admitted here quite clearly that only 18 months of implementing the ordinance will tell us whether or not the procedures are workable and honest and fair.

That's a little long-winded answer, but I've been wanting to make that point.

Mr. EDWARDS. That's very helpful.

In addition to the collection of this information and the waste of time that the Bureau is going through, there was also strong evidence to the effect that they engaged for a number of years in what has been described as Cointelpro operations, which was active participation in what individual agents or the director or whoever thought was counter-political activity in compliance with what particular agents thought within the national interest.

And I think Dr. Martin Luther King's case was a good example of that, whereby they felt he was a danger to the republic and so, therefore, they should individually take actions that would lessen his activities or do damage to his reputation.

Now where there allegations that the Seattle Police Department engaged in the type of activity that might be described as Cointelpro?

Mr. BERNSTEIN. I don't believe there were. I think the problems the Government faced on the Federal level are considerably more than what we face in Seattle, although I do feel at times the perceived crimes or problems of the FBI were sitting on our shoulders as we were writing this ordinance for the city of Seattle. Our ordinance was always looking at what those perceived practices were or have been, but, there are no examples of that, to my own knowledge, in the city of Seattle. And also the attorneys who handled the disclosure cases indicated there were no such examples.

Mr. REVELLE. I am sorry to differ, but being on the city council gave us a lot more input than the law department in terms of allegations. There were allegations, Congressman, of that kind of activity. Never proven, but there were, in the 4 years I've had several calls and letters making allegations that police were apparently trying to disrupt—in fact, it was even arranged for me to meet one night with an alleged informant who allegedly had participated in that kind of activity.

So, again, as I indicated earlier, we did not try to do a judicial sort of review on that, but the allegations were there, and that's what led to page 17 of the ordinance, where there are prohibitions against any person committing unlawful activity or engaging another person to do so, with some exceptions and against communicating information known to be false or derogatory with the intention of disrupting a lawful political or religious activity.

Those were put in there, not because there were proven cases. As far as I know, Paul is right about that, but were there allegations over the 4 years I worked on it? Yes, there were.

Ms. TAYLOR. Yes. In fact, some of the attorneys that have worked on drafting legislation for the Coalition on Government Spying have been victims of that kind of Cointelpro operation. Again, they weren't taken to court or anything, but they had police officers, undercover agents who were encouraging them to break the law during—these were during Vietnam war protests.

A police officer posing as a member of a political organization was encouraging other members to break the law. Fortunately they did not do so, but later on they saw the same person in a police department uniform. Those kinds of incidents have occurred in Seattle.

Mr. BERNSTEIN. I don't think anybody in the city attorney's office or prosecutor's office is opposed to the section dealing with prohibitions, unlawful actions, although again in examining the legislation, we ought to realize there were certain legitimate uses of this, such as the use of decoys, where you have a police officer go out and pretend to be a potential crime victim, instead of endangering an innocent citizen.

One additional thing I think is important, in the section that Councilman Revelle read, in terms of prohibiting departmental personnel from communicating information known to be false or derogatory with intention of disrupting a lawful or political activity, unless such communication occurs in the course of or in connection with a judicial proceeding or serves a valid law enforcement purpose, that is in there because there are certain times when it is necessary to convey derogatory information. That's the whole successful process of cross-examination, for instance.

It may be necessary under some circumstances to use lies to achieve ends to preserve the safety of different groups involved in potential political demonstrations, such as when Premier Teng Xiaoping visited recently, and there was violence from local groups and there were peaceful demonstrators, all attempting to converge at the same time.

So that those limitations, I think this was something everyone felt was proper to have.

Mr. EDWARDS. Thank you, gentlemen.

Mr. Volkmer?

Mr. VOLKMER. Let's say the Seattle newspaper had an article saying that the Organization for America is sponsoring a rally somewhere in the city, and the public is invited, and speakers will discuss means of people acquiring property from the wealthy, among other things, and I'm a police officer and I read that, and I go to my man in charge and say, "Hey, what's this all about?"

He says, "I don't know, why don't you go out and check it out?" So far there is no violation of your ordinance; correct or incorrect?

Mr. REVELLE. Correct.

Mr. VOLKMER. The police officer goes out and checks it out and finds out it's nothing more than a political organization, comes back and reports it, and that's the end; right?

Mr. REVELLE. That's fine.

Mr. VOLKMER. The police officer goes out, but then he hears one of the members say, of this group, say, "What we're going to do, is one of these large chain stores is ripping the people off and we ought to make up a bomb or bomb threat and get a lot of money out of them and disburse it to the people that need it, the poor in Seattle." It's a crime, isn't it, a threatened crime?

Mr. REVELLE. Yes.

Mr. VOLKMER. But what if the officer, or the people in charge of it, say, "No, we're not going to do that, I'm not going to have anything to do with that, that's not the purpose of this group"? Now where are we? What does the police officer do?

Mr. REVELLE. Well, the officer just receives that information, he doesn't record it or put it into the police department files. He doesn't have to do anything under the ordinance. Unless he's going to move toward recording it and getting it into the files, opening up an investigation, and it's going to involve the collection of restricted information. If it doesn't, he would just go ahead as they do now. But if it does involve collection of restricted information, then he would need to get an authorization from a lieutenant or higher officer to go further. Not to do what he had initially done, what you described.

Mr. VOLKMER. Could he get an authorization under your ordinance?

Mr. REVELLE. If there is reasonable—I have to get the language—a reasonable suspicion that criminal activity will be or has been or is about to be committed.

Mr. VOLKMER. Who's going to make this decision, all of a sudden? Outside people or his superior? His superior is going to ultimately, and all the good people outside, if it does not develop and that information is done and is put in the files, and no bombing is ever done, then a police officer is going to get sued, the city is going to get sued, but the police officer will probably get reprimanded or his officer in charge, and probably get demoted.

Mr. REVELLE. Not unless he's violated the ordinance.

Mr. VOLKMER. Let's say the organization didn't do anything.

Mr. REVELLE. The ordinance says that if you are standing in the position of the officer at that time, one must have a reasonable suspicion. That doesn't mean one has a certitude that it's going to happen. I've had a reasonable suspicion about a lot of things in my life, and they've never come true.

Mr. VOLKMER. All right. So would that be a reasonable suspicion of what was going to happen?

Mr. REVELLE. He'd have to look at all the circumstances.

Mr. VOLKMER. It's very subjective, isn't it?

Mr. REVELLE. Ultimately. Like most police work, frankly.

Mr. VOLKMER. So under your ordinance, I don't know as a policeman if I'd go ahead or not, but if there's a bombing, because I don't want to get in trouble, so then if there is a bombing, people would say, "You didn't do your job."

Mr. EDWARDS. Will the gentleman yield?

Mr. VOLKMER. Yes.

Mr. EDWARDS. What about the people that have just been out of jail from Puerto Rico? Suppose that two of them who are talking very violently right now, what would happen if they came to Seattle to have a meeting?

Mr. BERNSTEIN. I think this concerns us. There would be a lot of second-guessing, and a lot of lawsuits after the fact. This would have a chilling effect on law enforcement's willingness to get involved.

I think this was one of the reasons Councilman Revelle gave for not putting criminal penalties in there. I feel that they would make the chilling effect that much more emphatic. I don't think that going on the group's rhetoric alone would be enough, after the fact, as an attorney to tell the police, you've got a good shot at in court in upholding the reasonable suspicion. With the FALN, at least we have a track record and it goes back some 30 years.

Ms. TAYLOR. However, it's the police department that decides whether or not to give an authorization. They are the ones that decide

whether or not they have reasonable suspicions, someone in the department that provides the authorization. The penalty can be triggered if police don't get an authorization for collecting information when they should have. Officers cannot be held liable if they have properly obtained an authorization, even if their reasonable suspicion later doesn't pan out.

Mr. VOLKMER. Mr. Chairman, my time is up, but I would ask your consent to ask one further question.

Maybe I'm wrong on this. If an authorization is given by a superior to get the restricted information to the members of that club that I talked about, then the city is absolved from civil liability?

Mr. REVELLE. No.

But if the department does it correctly, people are going to lose and it's expensive, people running around filing lawsuits willy-nilly. It's a very expensive process. The real concern is it would be so expensive that no one will. As I indicated earlier, with this kind of legislation, I can't assure you of anything. In 18 months I'll be able to give you a better idea of how it's going to work. Our intention is that if the officer has some doubt about whether or not an authorization is needed, then he ought to get one. That's what we're training them to do. That's what the classes are telling them. If you've got a question, get one, it protects you, you're covered. Then if you're wrong, it's the city's problem and not your personal problem.

So I think there is quite a bit of sensitivity, Congressman, to not putting the police officers individually in an unfair position. In fact, the city council—much to the surprise of many people, because we are usually very cautious, I guess, about spending money on anything—the council voted for that particular liability, the city being liable, as opposed to individual police officers, because of the very experimental nature, if you will, of this kind of legislation.

Mr. VOLKMER. Thank you. Thank you, and I thank the committee for indulging me.

Mr. HYDE. Well, if wrongful authorization is given and the FALN does have a meeting in downtown Seattle, and these people whom the President found rehabilitated, or for whatever reason he released them, come out there with their talk of they'd do it again, and some poor unenlightened police officer thinks it's a good idea to monitor that meeting and nothing happens, doesn't the FALN have a cause of action then against the city for wrongfully issuing this authorization?

Mr. REVELLE. You said first he just went out and listened. He wouldn't have to get an authorization to listen.

Mr. HYDE. He monitored; he would need it to monitor?

Mr. REVELLE. Only if he were to collect written notes of political and religious information.

Mr. HYDE. Let me amend my proposition. He takes down notes or is wired to take all the conversation in.

Mr. Revelle. It's illegal to be wired in our State.

Mr. HYDE. It's illegal to tape a conversation, to be wired?

All right, then let's say he sits there and very surreptitiously writes notes, but he's gotten the authorization to do that, but someone finds out what he's doing and sues the city. Would that not be permissible under your ordinance?

Mr. REVELLE. Yes, and if, in fact, there is no reasonable suspicion of criminal activity, then the city would lose.

Mr. HYDE. Mr. Bernstein is talking about that having a chilling effect, being a deterrent; in other words, of the benefit that the doubt would always go not to investigate, not to monitor.

Mr. REVELLE. I don't think that's true.

Mr. HYDE. You don't think that's true? What does the chief of police of your city think?

Mr. REVELLE. I haven't asked him.

Excuse me, yes, I did. He felt that it was important to do what we did; that is, get the liability away from officers individually.

Mr. HYDE. I'm not talking about that. I'm asking you, does the chief of police support this ordinance?

Mr. REVELLE. Yes.

Mr. HYDE. We don't have any statement from any police officials, do we?

Mr. BERNSTEIN. Attached to my written testimony, I have public Police Journal articles on the subject. I think the present posture of the police department is that having this ordinance, they will do their best to enforce it. The chief of police publicly stated, and he only came on board in February of this year, well after the process was started, that he would have preferred, and he asked for a resolution of of the council directing him to administer and set up rules and procedures within his department, and not have a long involved, written ordinance. That request was not accepted by the council. The attempt then was, as I have outlined it in my oral discussion, to not burden the day-to-day work of the police department when it wasn't getting into sensitive areas.

I think on the whole he publicly supports it. He has stated that. I think we would have preferred not to have this ordinance. I think were the chief asked this, I think he would give a response somewhat along these lines.

Mr. HYDE. Would you say the FALN is a political organization? You, Mr. Revelle?

Mr. REVELLE. I don't know much about them.

Mr. HYDE. What about the KKK?

Mr. REVELLE. Ku Klux Klan? It depends upon their activities. During some times of their history they've been very dormant and mild and other times they have been violent.

Mr. HYDE. If they were organizing a clan in Seattle, would you think it violative of their privacy to have a police officer join to provide information on what they are doing?

Ms. Taylor?

Ms. TAYLOR. Yes.

Mr. HYDE. You shouldn't infiltrate.

What about the Puerto Rican liberation movement? What about it, Ms. Taylor?

Ms. TAYLOR. I believe that one should only use an infiltrator when there is reasonable suspicion that criminal activity is going to occur.

Mr. HYDE. Sure. Do you think a reasonable suspicion of criminal activity that it might occur would apply to the Puerto Rican liberation movement?

Ms. TAYLOR. Congressman, I don't know, on a general title like that. It depends on what's going on in each city. I think you have to look at it. There's a Puerto Rican liberation movement, there are very lawful aspects of it, and there are probably illegal aspects of it. I don't think you can just lump everything together.

Mr. HYDE. Aren't you asking the police department a lot to know what's going on in each city? They're trying to find out what's going on. The FALN takes credit for bombings. They are the affiliation of these people whom the President released, who are unrehabilitated up there. Don't you think it would be prudential to have some police officer in your town know what they are meeting for?

Ms. TAYLOR. I'm sure if they came to Seattle and were making statements like that, and if there was reasonable suspicion of a crime. I know that when Teng Xiaoping was in town, they had information that was not reasonable suspicion and police officers without infiltrating went to these organizations and said, "What are you doing? We're interested in what's going on," and that's fine.

Mr. HYDE. "Tell us if you're going to bomb anybody, in triplicate"? [Laughter.]

Well, OK.

Mr. BERNSTEIN. Congressman, if I might add, I think one thing important under our ordinance, the way it is written, is it's not a reasonable suspicion of criminal activity might occur, it's a reasonable suspicion that criminal activity will, is, or has occurred, and that again is a substantial difference in one of the things that might be explored is looking into the possibility of getting involved at a lesser level, where at least it might occur, and that's from a lawyer's point of view.

Mr. HYDE. You're putting an awful burden on the cop, as far as I'm concerned. You really do. The benefit of the doubt is always going to go to, you know, not taking a look at it, and that's fine until the bombs start falling.

But if provisional IRA were to hold a meeting, would you say, Ms. Taylor, that somebody ought to attend that and monitor it and take notes?

Ms. TAYLOR. The ordinance does not come into effect until it's collected and indexed for retrieval in the police department.

Mr. HYDE. What does that mean, Mr. Bernstein?

Mr. BERNSTEIN. I'm afraid I haven't understood it that way. If the information is collected—

Ms. TAYLOR. If it's collected, if it becomes a departmental record.

Mr. BERNSTEIN. One of the comments—

Mr. HYDE. He's taking notes. The provisional IRA has a meeting and some policeman thinks, it might be a good idea, I wonder, if I took notes.

Mr. BERNSTEIN. That's covered by the ordinance.

Mr. HYDE. That's forbidden?

Mr. BERNSTEIN. It's not forbidden—

Mr. HYDE. He says it's true, you say it's not, Ms. Taylor smiles.

Mr. BERNSTEIN. I think one of the comments is that the FBI attempt to—our officers are not, and I think that will be part of the problem. The chief has asked for legal advisers to help get the department through that.

Mr. REVELLE. Congressman, I'd like to clear it up, if I may. It depends upon how you phrase your example. Given the way you phrased it, the ordinance would not take effect—"collect" means to write down or preserve information in a tangible form as a record or file of the department, and until you have done that, you are not under the authorization provisions.

Mr. HYDE. Therefore, he could go to this meeting—oh, but if he wrote anything down and turned it out, then he'd be under the ordinance?

Mr. REVELLE. Yes. I know that because we spent a lot of time arguing about whether we should try to cover officers' private notes. Police officers write notes all the time.

Mr. HYDE. Sure, because they don't have photographic memories.

Mr. REVELLE. We decided after a great deal of debate not to try to cover those notes. We would only cover them if the notes were converted into something that went into a department file.

Mr. HYDE. As long as he keeps them in his pocket, they are not covered, but if he exchanges them with a superior or brother officer, then it comes under the—

Mr. REVELLE. No; you said two things, I said a department record or file. Exchanging it with a brother officer is not a record or file.

Mr. HYDE. But if it goes into the department where someone else can retrieve it, where that information might be useful to somebody else?

Mr. REVELLE. That's right.

Mr. HYDE. I see.

Mr. REVELLE. At that point it's not prohibited. You simply have to get an authorization if the information involves religious or political information.

Mr. HYDE. If Rev. James Jones of the People's Church was operating in your town and somebody complained about what was being said or what was going on, it really would be a violation of your ordinance to have someone go there and attend some of those meetings and take some notes, right, and turn them in?

Mr. REVELLE. Yes.

Mr. HYDE. OK. He may take the notes, but he may not turn them in?

Mr. REVELLE. That's right.

Mr. HYDE. Until after everyone is killed, and then—

Mr. REVELLE. Because that initial stage would be part of the process of deciding whether or not there is a reasonable suspicion of criminal activity. We never said, we never intended to say in the legislation, you can't go to the meetings, you can't listen, you can't write anything down. But at the point you're going to start putting it into the system, so to speak—the political or religious information at that point, you need an authorization.

Mr. VOLKMER. Gentlemen, would it be possible—it's not in the ordinance, but would you look at the possibility of using something in the charter and use of an inquiry as distinguishing that from an investigation, with the knowledge that if the inquiry is not pursued, that that information then is destroyed within a certain period? It's something to think about.

I'll give it back to you gentlemen.

Mr. EDWARDS. I might observe that in early hearings before this subcommittee, and in early audit by the General Accounting Office, that domestic intelligence files of the FBI, there were 100,000 or so open cases, and I think two or three instances of criminal conduct, but none of the criminal conduct involved had to do with what was suspected. It was local crimes that these people eventually committed, and in only one or two cases, I recall where crimes were alleged to have been prevented.

So there was a massive waste of time where these officers and FBI agents were free to find out what was going on in the community and check out organizations and so forth. That's what they're not doing now pursuant to certain regulations by the Attorney General, and I think they are working rather well.

One of the major problems, of course, is, how would you find out if your ordinance is being obeyed and complied with by the police? A device that you use in the ordinance is the independent auditor appointed by the mayor; is that correct?

Mr. REVELLE. Appointed by the mayor, but subject to confirmation by the city council.

Mr. EDWARDS. Right.

Now we have no such safeguard in the FBI charter. There is no way that this subcommittee, or the Attorney General, actually, is guaranteed any access to any allegations of misbehavior or access to any file. I don't know how we are going to find out if the FBI charter is being complied with unless somebody comes and tells us or unless we read it in the paper.

Would you care to make an observation on that? Your charter has the added safeguard that ours doesn't. You have the ordinance, we don't.

Ms. TAYLOR. It's interesting, as I said earlier, in 1976 the police department actually suggested an independent audit of police intelligence records to be conducted semiannually.

Mr. EDWARDS. How did they suggest that when now they say—and the chief does say this, I am sure—that's one of the dangers to the informant program?

Mr. BERNSTEIN. Perhaps I could clarify. When Police Chief Hansen, two chiefs ago, recommended the scope of the blue ribbon committee, that examined the problem, it was only to look at the police intelligence unit of the department, not the rest of the department, only that police intelligence unit functions, and the suggestion was the auditor be the county prosecutor or perhaps State auditor's office, and it was limited to that.

I would state that perhaps as an individual, I was in favor of the auditor as a control over the ordinance. I maintain that position, although I appreciate the police disagree with me, and I have presented that information to the committee this morning.

Originally we suggested that the auditor, in lieu of the notice, provisions, and civil liability and other controls, what we end up with in the legislative process was some of all of three.

I do think that through strict administration within the department, holding the supervisors accountable, and at least in recent experience, the Freedom of Information Act, and what the press has done to educate the public in these areas, that we are in a considerably different position now than we were 10 years ago.

I would not feel uncomfortable, knowing the Federal setup, the Attorney General's Office would conduct an audit, but again I appreciate the police may not see eye-to-eye with me on that.

I do think the Freedom of Information Act and the fourth estate has had a very great effect on keeping the police from making the same type of mistakes they made in the past.

Mr. REVELLE. Congressman, it was the unanimous judgment of the city council—and I pointed out earlier how rare that occurs—

that the auditor was an essential element in this legislation, really for two reasons:

One would be to detect and assure the public of detection of any abuses of the legislation. Second, we will be getting from the auditor an assessment of how the legislation is working, and I suspect one of the first things the auditor will focus on is what parts of the legislation are causing the police officers problems. Not just what parts are being abused. So the auditor is not a narrow, "go find us some kind of bad guys" auditor. He or she is to look at the entire functions of the legislation, to be the eyes and ears, if you will, for the mayor and city council who would make the appropriate changes.

Also we are not sending in as an auditor some political hack off the street. We have set in the legislation seven fairly tough criteria for that auditor: reputation for integrity and professionalism, commitment to the responsibilities of law enforcement, commitment to the ordinance, demonstrated leadership and ability, knowledge of law enforcement and police activities, and so forth.

We have been thinking about who might be able to meet these seven criteria. We've only uncovered about five people in the entire city of Seattle who are currently being considered as possible auditor material.

Interestingly enough, initially my father was one of them, but because he is my father, that caused some problems. He wouldn't do it, anyway.

But the person who is an auditor, Congressman, to make this work, has to be someone who is knowledgeable about law enforcement, sensitive to civil liberties, and has some guts. And if we don't get a quality person, the auditor provision is not going to work. Simply writing it in this ordinance is not going to do it.

But we really feel that kind of approach is superior to all sorts of penalties. That's why we took out criminal penalties, and we felt it was superior to providing elaborate notice procedures, because we thought those were administratively an incredible burden.

I guess I was probably the strongest advocate of the auditor. I think it's potentially a very effective way to go, but as I said to Congressman Volkmer, ask me in 18 months or 24 months.

Mr. EDWARDS. If we got an auditor for the FBI in this legislation, we would have to consider whether or not there should not be an auditor in all the other Federal police organizations. There are three or four or five huge ones. Secret Service and so forth.

Mr. VOLKMER. Mr. Chairman, I'd like to ask another question.

Mr. HYDE. I can name you two people right now, just off the top of my head, who would probably give you qualified—they would qualify eminently under the criteria you have described. They would come down with opposite reports and they are Don Edwards and Chuck Wiggins, two men eminently qualified.

So one auditor, depending on their mindset, their propensities, their background, their education, their philosophy, give you two opposite reports, it would seem to me.

Mr. REVELLE. Well, in order to make it, Congressman, they've got to go through the tried and true democratic process of city council confirmation, and if they can't get five votes——

Mr. HYDE. No, no, you misunderstood what I said. They can qualify eminently, integrity, commitment to civil liberties, belief in

the ordinance. I'm just saying you're hanging an awful lot on one person—and you could get—it's just conceivable, I could think of people who would fill that bill perfectly. Congressman Wiggins, who retired here, but who would qualify. Don Edwards would qualify. But I'm confident we'd come out with two different points of view.

I'm just wondering whether one auditor is enough, is what I am saying.

Mr. REVELLE. First of all, I'm not sure. I just met Congressman Edwards, and I don't know Congressman Wiggins [laughter] so I don't know whether they are qualified or not. What I really don't know, being serious, is whether they'd come down differently, because the ordinance sets forth a lot of requirements the auditor must meet. It's not just go out and do what you want. There are about four pages of very specific instructions for the auditor.

So I think the ordinance structures it enough, if you get a good person, no matter what their political persuasion. If we get a good person, there's an excellent chance it will function effectively. The auditor is probably the longest provision in the ordinance, and that's because we really tried to lay out very clearly what we expected of the auditor in terms of qualifications, what we expected of the auditor in terms of things he or she would have to do.

As Paul indicated, they can't take records out of the police department. It has to all be done. Even if we say it's an honest person, we still don't trust him.

Mr. HYDE. Daniel Ellsworth would never qualify, taking records out of the office.

Mr. REVELLE. He would have trouble, yes.

Mr. EDWARDS. I thank Mr. Hyde for his wise observation and will keep it in mind in the event things don't turn out so well in November 1980. [Laughter.]

Mr. Volkmer?

Mr. VOLKMER. I'd like to continue that. You are banking a lot on this, and I just hope you get the right type of person, because I can see, too, where—let's assume that the auditor you pick, because it's going to be basically political, a lot of it's going to be on you and the other members of the council, how you view this person. There is going to be a lot of subjectiveness.

Mr. REVELLE. Ultimately, the selection comes down to being a political one.

Mr. VOLKMER. To a large degree. And the thing that bothers me is depending on his frame of mind as to how he views the police department, and how he views police activity; how he views an individual's rights may have a lot to do as to whether or not he views a certain investigation, a certain authorization as being within the realm or not.

Ms. TAYLOR. Sir, I think the ordinance is specific enough, the requirements for the authorization, for example, that there will not be as much discretion as you're describing in the role of the auditor. There's certainly going to be discretion in choosing the auditor by the city council, which is appropriate.

From a citizen's point of view, it's fine for me to have the most conservative strict constructionist as an auditor. We would just like the auditor to be someone that would follow the law, that's all we're asking.

Mr. VOLKMER. I hope to be here, and I hope you're still where you are 18 months, 2 years from now. We'll get together again and see how it works.

Mr. REVELLE. I'd be happy to, Congressman, and that time period was set in part because there were people who felt I have to be around for the review. [Laughter.] And unless I'm impeached, I will.

Mr. BERNSTEIN. The true test of this ordinance is going to come when the political climate in our part of the country changes. History tells us things go in cycles. The ordinance was written in a time of peace. We hope it continues. If it does, the police will be doing very little investigating for those areas, and so 6 months, 1 year, 18 months may not tell us very much, depending upon the circumstances the police find themselves facing at the time.

Mr. VOLKMER. Thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. Counsel?

Ms. LEROY. I'm afraid I'm a little confused about the conversation the three of you had with Mr. Hyde a little while ago. I thought the focus of the Seattle ordinance was not the way information was collected, but the type of information that was collected. Is that correct?

Mr. BERNSTEIN. The primary test is the type of information, but you have exceptions dealing with—

Ms. LEROY. Informants?

Mr. BERNSTEIN. That's correct; that's a subcategory, and they work together in the ordinance.

Mr. REVELLE. We don't deal with wiring because our State law covers it.

Ms. LEROY. In the hypothetical that Mr. Hyde was proposing to you, when a police officer goes to an FALN meeting in Seattle and takes notes, my understanding was under the Seattle ordinance he can do that, and any notes that involved evidence of criminal activity, whether it's future or uncommitted, can be preserved and maintained, can be used in criminal investigations. The moment that information begins to focus on the group's political ambitions or on the political ideas of various members of the group, then that information cannot be maintained.

Now I realize there is a problem in dealing what's political and what's criminal, but is that not the thrust of the ordinance?

Mr. BERNSTEIN. Well, it's a lawyer's question, and it would require a lawyer's answer. It depends on the circumstances. When you are dealing with political associations, that's who you're associating with; if you're within this same group, you're calling yourself political. This might well be a political association. To collect that information, to write it down, there's no prohibition in the ordinance to make any use of it, reasonable use whatsoever, in terms of putting it in a file and keeping it for future use, you've got to have that reasonable suspicion that the criminal activity will occur or has occurred.

We should also assume from Congressman Hyde's example, that you are dealing with a public meeting, a meeting that anybody could go to. If these were not public meetings, the police or their informants or their infiltrators could not be there in the first place, unless you already had a reasonable suspicion and an authorization.

So I think again it depends upon how you—the facts and circumstances.

Mr. REVELLE. I want to make sure this is clear, because I think Sam Smith, one of our council members, says, "I'm just a simple man," if it does not involve political or religious activity, you understand, the ordinance does not apply, in effect. It's just the authorization and procedures and so forth are not relevant.

If the officer is only going to—information is—so the only time anything starts into effect is if the information is political or religious.

Mr. VOLKMER. Or sexual preference.

Mr. REVELLE. Sexual preference, political, or religious, I tend to focus on that. If that kind of information is involved, but it's not collected in the defined way of the ordinance, that is in a tangible form, and recorded in the department, then it doesn't come under the ordinance either. It's only when it's political, religious, or sexual, and it's written down to preserve and in tangible form as a record or file of the department that the machinery starts going.

The machinery is not prohibited. It simply provides a written record to justify what you are doing.

Mr. BERNSTEIN. The difficulty comes in in trying to walk that line between what's political and what's strictly criminal, and if party platform or 'he group's platform is changing the political process, it may also be a criminal statement.

Ms. TAYLOR. Therefore the authorizations would go into effect.

Mr. BERNSTEIN. And therefore you have enough information already to get the authorizations.

Ms. LEROY. Is it true that—is this a fair characterization of the effect of the ordinance—that the difficulty would come not with respect to groups like the IRA or the FALN, but with respect to new groups that no one's ever heard of, and no one understands who the members are, what their motives are, what their activities are? Would that be where you think the biggest problem would come in terms of police activity?

Mr. BERNSTEIN. The biggest problems would come there. There would still be problems dealing with the nationalist groups or other groups. Unless you have specific information that they are planning new criminal activity, I think we have difficulties. I think it would be somewhat easier when they already have a track record.

Ms. TAYLOR. As Congressman Edwards pointed out, the record has shown that collection of information on anyone without any kind of suspicion does not lead to finding information useful in some kind of prosecution or finding out more information about criminal activity, and that's really the difficulty.

In the police department in Seattle, there are only 10 intelligence officers. They don't have time to be collecting information about every organization in the city in the hopes of finding the one needle in the haystack that may be violent. It's not a useful way even from a management point of view to find out information about suspected criminal activity.

Ms. LEROY. That leads me back to the question I wanted to ask a couple of minutes ago.

It's my understanding in talking to the police department in Seattle that, in the early 1970's, I don't know how many but there were a number of what you might call political terrorist groups that were engaged in bombing. It's my understanding also from the police that the leaders of those groups are all in jail now. Is that not true?

Mr. BERNSTEIN. The best known of the leaders is now on the FBI's 10-most-wanted list.

Ms. LeROY. Well, to give you more background for my question—I assume that at the time those bombings were taking place, there were not the kinds of restrictions on the activities of the Seattle police that exist in this ordinance.

Can any of you tell me whether during the course of their investigation of those individuals and those activities, whether they were ever able to infiltrate those groups, whether they ever developed active informants, effective informants, whether they were ever able to prevent the illegal activities of those groups before the bombings actually happened? Or were they only able to investigate effectively after the bombing took place?

Ms. TAYLOR. It was only after the bombing took place. It was only during the grand jury investigations that they really conducted investigations at all, and they were not able to stop any kinds of bombings. That has come out publicly. There has been no information that an advance warning stopped anything; in fact, we didn't have any infiltrators within the terrorist organizations.

Mr. BERNSTEIN. Some of the information would not be publically available as these groups still exist. There may be information—other than that the police would have to answer that question.

Mr. REVELLE. If I may make a general point raised by your question. One of the highlights, I think, during our review was when we asked two national experts on police intelligence to come to Seattle. One of the experts, Donald Harris, was selected by the Seattle Police Department and was recognized as the No. 1 knowledgeable person in the United States on police intelligence. And we had panel discussions in public, and it was very interesting, because while we thought we'd have in this group a clash of wills and attitudes, they agreed on about 85 to 90 percent on everything they said.

And it was Harris who summarized; he said, "Mr. Berman and I agreed that police intelligence operations have been almost totally ineffective in the United States." Remember, this is a police spokesman speaking. I don't know if your police department regretted this selection afterwards, but he was very candid. He said 90 percent of intelligence investigations either violates civil rights or is totally ineffective in uncovering any criminal activity.

You were asking about how many of our investigations led to arrests. Nationally, at least according to Harris, a minuscule amount. That's what he was concerned about. He was willing to come out and talk to us because he wanted to work toward developing a unit that was effective at going out and detecting and preventing criminal activity. According to him, there wasn't any in the country. This was about 3 years ago, maybe there is now. But I think that at least in Seattle was a major point that hit the council and everyone involved in the process—that it wasn't just a civil liberties problem, it was a matter of effectiveness, effective use of police resources, and here was the police spokesman saying what we are doing is ridiculous.

Ms. LeROY. Mr. Bernstein do you want to comment?

Mr. BERNSTEIN. He also said when you're dealing with the police intelligence unit, and so on, that's one thing, but when you're dealing with any of the certain types of information that you gather on any individuals in the department in your normal routine, be it homicide,

robbery, or otherwise. That gets into situations that we have here in our particular ordinance.

Mr. BOYD. Mr. Bernstein, you were a member of the drafting committee, were you not?

Mr. BERNSTEIN. Yes.

Mr. BOYD. How many were on that committee?

Mr. BERNSTEIN. I think the composition of counsel—Mr. Revelle might be better at this—it varied from time to time depending upon staff and energy. There were representatives, two people from our office, the city attorney's office, the police department had their representatives.

Mr. BOYD. How many?

Mr. BERNSTEIN. It varied from time to time.

Mr. REVELLE. It was my committee. I was the chairman, so why don't I give you the makeup, if that's what you're interested in.

It included one, two, three officers in the Seattle Police Department; two attorneys from the city attorney's office, an attorney from the mayor's office, an attorney from the city council, two attorneys from the Coalition on Government Spying, plus Kathleen Taylor, the coordinator. Did I say an attorney from the Law and Justice Planning Division of the Office of Planning? That's part of the Executive Department. And my legislative assistant was the working chairman of the committee, but toward the end I came in and chaired the Drafting Committee and made all the decisions, subject to city council approval.

Mr. BOYD. You indicated, Mr. Revelle, in your statement, that the police department feels that some areas are more strict than they ought to be. I suppose that opinion came up during your review. Could you outline some of those concerns?

Mr. REVELLE. Yes; we spent extensive time dealing with every single one of the concerns voiced by the police department.

Mr. BOYD. What were those?

Mr. REVELLE. And, in fact, we even went through two rounds. When we thought we'd addressed those concerns, then we got a new police chief, so we went through his concerns. A lot of them were resolved.

Do you want me to focus on the ones that weren't?

Mr. BOYD. That's right.

Mr. REVELLE. OK. A number of them were resolved and in fact that's why the chief of police ultimately did not oppose the legislation.

I think first of all there was a general feeling that it should be in the form of a resolution rather than an ordinance. That was one unresolved concern.

Second, they thought the ordinance should focus entirely on the police intelligence unit, rather than covering all investigations of the department. That was a concern that was not resolved.

Then there were other areas where they are concerned, but they are sort of willing to look at it. They wonder about the authorization procedures—is that going to be administratively unworkable and burdensome?

We reached the point where you couldn't demonstrate one way or the other, and so they said fine, we'll go ahead and work with that. So that's sort of halfway between a resolved concern and unresolved concern.

Let's see. A major concern was criminal penalties. We didn't include that. The notice provision—we didn't include that.

Ms. TAYLOR. The auditor was not a concern. Police representatives on the Drafting Committee kept reminding us that it was the idea of the police department in the first place.

Mr. BERNSTEIN. Could I bring something to the attention of the committee, if I could, since it's been raised?

Under the interim police chief, he felt that it was incumbent upon him at that time to take his position from the mayor who was in support of the ordinance. The police department at that time was in favor of the audit procedure and they were following the direction at that time. It's not their current position, although obviously they are willing to work with it and try to live with it.

Mr. BOYD. I think we should move on with this, if we have time, Mr. Bernstein.

You have 6 years of felony experience, is that correct?

Mr. BERNSTEIN. Yes.

Mr. BOYD. Are you satisfied that this ordinance does not interfere with effective law enforcement in Seattle?

Mr. BERNSTEIN. For 95 percent or more of what we've had to deal with in the last several years, yes, that would be correct. Will the situation change? There are certain areas where it's not been a major problem, recently. My answer might change, but I thought back to various cases I've handled. This ordinance would now only impact a few of those cases and would not have prevented prosecution of any of those cases. It might have made it more difficult.

Mr. BOYD. OK.

Ms. Taylor in her statement says, and I quote, "The FBI should be prohibited from collecting any political or religious information during a preliminary inquiry."

Do you agree with that?

Mr. BERNSTEIN. I would have to say that the way we've defined it in the terms used in our ordinance, we would have to disagree with it because it would be impossible to separate out what's a political statement and what's a criminal activity or extent. For the term to be more narrowly defined, perhaps, in the area of legitimate democratic political statements, I don't know if you could do that or not. My answer might change.

Mr. BOYD. Ms. Taylor, your statement indicates that you would suggest that Congress appoint GAO as a possible auditor for the FBI. Who would audit the auditor under your suggestion?

Ms. TAYLOR. I don't think that's necessary. You can't continue to have higher levels of review. At some point you have to give responsibility to another organization.

Mr. BOYD. How would you go about doing that relative to GAO?

Ms. TAYLOR. I know GAO conducts audits on a variety of organizations. They recently did one—for the LEAA on the interstate organized crime index. They have had experience in conducting law enforcement audits.

Mr. BOYD. Never, to my knowledge, have there been any—my understanding was that was one of the problems, that there has been disagreement by the FBI and the Congress as to the extent—

Mr. EDWARDS. They have never been able to look at the files. They've done studies, but there's always an agent standing between them.

Mr. BOYD. Do you have any suggestions how that can be resolved?

Ms. TAYLOR. I would think that someone within some department within the GAO in connection with the Department of Justice. I'm sure that those kinds of things could be worked out, where the Department of Justice and the GAO can agree on an office to audit the FBI. I don't think that should be a tremendous difficulty, but I don't have any specifics, not having worked on the Federal level.

Mr. EDWARDS. Thank you, Mr. Boyd.

Thank you for that suggestion. Perhaps it would be a good idea to have the auditor to come out to the Department of Justice. I don't know.

We are starting to run out of time. Mr. Volkmer, do you have anything?

Mr. VOLKMER. No. Thank you.

Mr. EDWARDS. We have quite a number of questions we'd like to ask that we didn't have a chance to do today. If we submitted them to you by mail, would you take a look at them and try to help us?

Mr. BERNSTEIN. Certainly, Mr. Chairman. It would be preferable. It would give us a chance to organize our thoughts.

Mr. EDWARDS. You've been very good witnesses. You've helped us very much. It's a unique experience you've been through. We are very grateful for your coming all this way and giving us that valuable testimony.

With that, the subcommittee is adjourned.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]



# LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, OCTOBER 18, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 9:30 a.m. in room 2237 of the Rayburn House Office Building, the Honorable Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, Volkmer, Hyde, and Sensenbrenner.

Staff present: Janice Cooper and Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning, the House Judiciary Subcommittee on Civil and Constitutional Rights hearings on H.R. 5030, the proposed legislative charter for the FBI.

Today we begin to focus on specific provisions of the charter—in this case, the section providing for FBI access to third-party records.

This provision is a grant of new authority to the Bureau—an authority that it feels is vital to the effective operation of its white collar crime and organized crime programs.

This grant of power, however, involves important questions of privacy and of due process—questions which must be explored in detail during our consideration of this legislation.

As with virtually every difficult legal and political issue, there are competing interests at stake here. On the one hand, we all want the FBI to have the ability to do its job well.

Its job is to investigate allegations of criminal activity. If it cannot obtain access to the information it needs, it cannot investigate.

On the other hand, investigative techniques that intrude into the private lives of American citizens must be used cautiously and must contain safeguards to assure protection of privacy and due process rights.

One model to which the Justice Department looked in drafting the investigative demand provision—and in attempting to balance the competing interests—is the recently enacted Right to Financial Privacy Act.

Our first two witnesses played active roles in the development of that legislation and I would like to welcome two of our distinguished colleagues, the Honorable Stewart McKinney, of Connecticut, and the Honorable John Cavanaugh, of Nebraska.

We are pleased to have you today. Stewart, I understand you have to leave at 10 so unless my distinguished colleague from Nebraska has remarks to make, you may proceed.

Mr. DRINAN. Thank you very much.

I want to commend them for their leadership in that bill last year.

We were very proud of them. I know some of the difficulties that were confronted and I welcome their leadership in this very difficult hearing.

# **TESTIMONY OF HON. STEWART B. McKINNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT**

Mr. McKINNEY. Thank you, Mr. Chairman.

Last week, the administration introduced its privacy protection amendments of 1979. These are intended to insure that the individual rights to privacy are upheld by consumer reporting agencies, creditors, depository institutions and independent check and credit card authorization services.

They do not address, however, an even greater concern: the ability of Government agencies, such as the FBI, to obtain these records and to exchange them with one another virtually at will.

As a result of this omission, the U.S. Government is coming perilously close to advocating a "do as I say, not as I do" attitude toward privacy protection.

Consideration of the proposed FBI charter presents us with a valuable opportunity to act responsibly on this issue. At the very least, the charter should adhere to the two underlying principles of the Right to Financial Privacy Act:

First: That the customer be given prior notice of the government's attempt to gain access to his or her bank records.

Second: That the customer be given an opportunity to contest government access in court.

You are already aware of the specific concerns raised in this regard in our August 3 letter to Chairman Rodino. However, I would like to explain two sections of the act which I believe deserve particular attention.

One of the reasons government access to personnel records must be guarded so carefully is that interagency transfers are so loosely constricted. Once a piece of information crosses the threshold from the private to the public sector, the genie is out of the bottle.

I raise this issue as one who recently spent quite a horrifying year in secret sessions of the House Assassinations Committee.

What emerged from those hearings was a history of abuse, of lower-echelon Federal employees waging personal vendettas by transferring information, and of collusion between agencies.

To allow this to continue would amount to an official endorsement of the practice.

Last year, however, the Justice Department made a vigorous effort to eliminate provisions in the Financial Privacy Act which affected such transfers. The Justice-approved language required customer notification of such an exchange 30 days after it had taken place.

During full committee markup, I added an amendment which limited such transfers to some extent by adding two provisions:

First, notice was to be given that records were being sought; second, standing to object was to be given the customer before, not after, the transfer.

Congressman Goldwater and I offered an amendment on the floor which made these limitations more workable, and now an agency can transfer financial information to another agency only pursuant to a legitimate law enforcement inquiry.

Put very simply, if there isn't a legitimate reason for a transfer, an agency should not be allowed to make one.

Surprisingly enough, the proposed charter lacks even this minimum assurance of protection with regard to nonfinancial records.

One purpose in fighting so hard for some restrictions on the inter-agency transfer of information was to establish model procedure to include in other privacy legislation.

Yet the proposed charter would set up separate procedures for the Bureau to follow with notable deviations from the Financial Privacy Act. Further, the bill contains virtually no restriction on disclosure, and it uses the Privacy Act of 1974 as its model even though recent history has proven it does not work.

A second important provision concerns the concept of "burden." Prior to the passage of the Financial Privacy Act, the Government could subpoena an individual's financial records.

While the individual could object to such a subpoena, the burden of going to court to uphold such an objection fell on the customer, not on the Government.

As originally drafted, the administrative subpoena provisions of the act placed the burden of going to court on the Government once an individual objected to the subpoena.

I strongly supported this provision, and was disappointed when the Justice Department prevailed on other supporters of the act to put the burden of going to court back on the customer.

During full committee markup of the Financial Privacy Act, I failed by just two votes to remove this burden from the customer.

This evidently alarmed the Justice Department and, as a result, privacy advocates in Congress and the administration came up with a package that would be more acceptable.

I participated in some of those negotiations and offered an amendment on the House floor to improve the final version of that legislation. The act now provides a simplified form and procedure to the customer allowing him to initiate action by mail.

Unfortunately, the proposed charter, as it applies to subpoenas for nonfinancial records, fails to give the subject of scrutiny any such assistance.

In fact, the proposal provides no guidelines to the customer whatsoever should he want to proceed in court, and I view this as a serious drawback.

Further, even if the proposed charter is improved along the lines of the Financial Privacy Act, it is still not clear from this legislation that the customer has a true right to challenge FBI access to his records.

These points as well as others cause me grave concern and suggest that this committee should proceed with extreme caution. It contains safeguards for individual rights that were won through hard bargaining with the Justice Department.

I hope that those rights will not be forfeited through loosely drafted provisions.

Mr. Chairman, I do not come here today with comprehensive solutions in mind. Rather, I would simply suggest the need to proceed cautiously along this path and to ask frequent and meaningful questions, particularly of the Justice Department.

For instance, will this charter be truly governed by the Financial Privacy Act with regard to financial records? Could this charter be superseded by subsequent privacy legislation with regard to non-financial records?

Why doesn't the proposed charter cover employment records, one of the most frequently used sources of personal information and one of the sources most frequently abused by Government agencies.

These and other issues simply must be raised.

Mr. Chairman, we must make some fundamental decisions about the way in which the U.S. Government views its responsibilities toward its citizens and their records and their privacy. A citizen has the right to prior notice before the Government goes wondering through his or her personal records and, even more importantly, before agencies trade information regarding that citizen with one another.

To respect these rights is not to obstruct law enforcement activities. Rather, it is to indicate that if a crime has been committed, the Government must prove that there is reason to suspect an American citizen before that citizen's records are examined.

In short, we cannot trample upon the rights of all citizens just to insure we catch a few of them.

Just in closing, I would state to you that I pray we will never see the FBI sink to the depths it sank to during the final years of the Hoover administration. With 2 years on the Assassinations Committee, I can tell you this without violating confidence: People's private records were literally spread throughout the entire Government of the United States with the instructions to find something on them, destroy them, discredit them.

The most appalling abuse of human privacy that we even experienced in this country on personnel rights. If we are going to draft a new FBI charter, let's assure ourselves we don't ever again leave the loopholes that can allow a man like J. Edgar Hoover to go berserk with the rights of American citizens.

Mr. EDWARDS. Thank you very much, Mr. McKinney.

Is it the witness' wish to have Mr. Cavanaugh go next without questions?

If there is time left, we will interrogate both of you. It's a splendid statement. Thank you very much.

Mr. Cavanaugh.

## **TESTIMONY OF HON. JOHN J. CAVANAUGH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA**

Mr. CAVANAUGH. Thank you.

I would like to thank the committee for this opportunity to testify on the proposed charter for the FBI. As a primary sponsor of the Right to Financial Privacy Act which passed the Congress last year, I have a strong interest in the new investigative demand authority provisions of the proposed charter.

My first priority is to assure that the new charter does not compromise the protections enacted last year. I understand that the sponsors

of the new charter share this aim. However, by its terms, the charter's new subpoena power is made subject only to section 1105 of the Financial Privacy Act. The Financial Privacy Act is carefully balanced legislative compromise with provisions included which provide privacy protection without unduly limiting legitimate law enforcement activity.

The proposed charter fails to strike that balance in the area of financial records. By making the subpoena power subject only to section 1105 of the Financial Privacy Act, the drafters of the proposed charter exclude provisions designed to protect privacy and insure that legitimate law enforcement activities can proceed without undue hindrance.

For example, section 1109, which permits delay of the customer notice required under section 1105, is not included. This is an important provision because it insures that, with a court order, a law enforcement agent can obtain records without notice to a customer if there is reason to believe that such a notice will result in (a) endangering life or physical safety of any person; (b) flight from prosecution; (c) destruction of or tampering with evidence; (d) intimidation of potential witnesses; or (e) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

Another key section ignored by the proposed charter, section 1112 of the Financial Privacy Act, governs interagency transfer of financial records. This provision was strongly debated by the Banking Committee and the administration. I think the language that was ultimately adopted by the Congress will prevent irresponsible transfer of sensitive information, but will permit legitimate transfers without difficulty. The FBI should remain subject to this section.

Other important aspects of the Financial Privacy Act, such as the cost reimbursement requirements of section 1115 and section 1111 requiring financial institutions to promptly assemble subpoena records, should also apply the new FBI subpoena power. To preserve the careful balance was reached last year, the FBI charter should make clear that the new administrative subpoena power it confers, and the information obtained under it, will be treated the same, in all respects, as any other administrative subpoena power covered by the Financial Privacy Act.

The new subpoena power in the proposed charter also would be subject to guidelines issued by the Attorney General. I assume the guidelines would govern the internal procedures of the FBI. However, I believe this point should be clarified in the draft charter, or at least in legislative history. Certainly, these guidelines should in no way compromise the statutory rights in the Privacy Act.

I would like to make clear to the committee that, from my perspective as the sponsor of the Financial Privacy Act, I have no objection to granting the FBI this new subpoena power if this committee and the Congress believe it absolutely necessary. However, I would like to share with you some of the origins of this new proposal.

In my discussions with the Department of Justice during the last Congress, we agreed that privacy legislation should end informal access to financial records. We agreed that FBI agents should not be able to obtain financial records simply by showing a badge. However,

the FBI was very concerned that this access be replaced with something, since if the legislation were enacted, they could only get financial records using a grand jury subpoena.

I made clear to the Justice Department that the Banking Committee had no jurisdiction to grant subpoena power to the FBI. I did suggest that the Financial Privacy Act's effective date could be delayed to give the FBI time to obtain subpoena power through the regular channels.

This suggestion was not adopted by the Justice Department. Instead, the Department offered the formal written request procedure as a compromise. I agreed to this procedure since it formalized the informal access then enjoyed by the FBI, with privacy protections, and raised no jurisdictional obstacles.

The Department projected that financial institutions would comply with these requests since the customer would be given a chance to challenge FBI access, and the institution would be reimbursed for its expenses. The Department now says that many banks are not honoring these requests. Therefore, it says the FBI needs a new subpoena power.

I believe this committee should examine the assertions of the Department carefully in this area to determine if the facts support them. Since the formal written request is such a new idea, there may simply be a lag in the bank's acceptance of it.

In addition to requesting subpoena power to obtain financial records covered by the Financial Privacy Act, the FBI has asked for authority to subpoena records not covered by that act or any other similar safeguards. Does the FBI need this authority, or do they obtain these records now without difficulty?

In the Financial Privacy Act we attempted to cover virtually all the records within the Banking Committee's jurisdiction since these were seen as very sensitive, showing a person's habits, political, and religious views, and other sensitive information. Other records covered by the new FBI subpoena power may be just as sensitive. For example, telephone records could show an individual's personal contacts over a long period of time.

Bills similar to the Financial Privacy Act aimed at covering these records had been introduced, but we on the Banking Committee lacked jurisdiction and therefore could not act on those proposals.

Nevertheless, the provisions of the new FBI charter do not provide the same protections for nonfinancial records. In a letter to Chairman Rodino of the House Judiciary Committee which I forwarded to you, I along with Congressmen Stark, McKinney, Rousselot, and Goldwater specified some of the key differences between the Financial Privacy Act's coverage of financial records and the proposed charter's coverage of other records.

I hope this letter can be added to the committee's record. I won't go into all the specific points made in it, but I would like to make one overall observation.

When I introduced the Financial Privacy Act in 1977 it was only 13 pages long. By the time it finally passed the Congress it had grown to 33 pages. Many provisions were added at the behest of the Justice Department and other law enforcement agencies; the financial institutions and privacy advocates recommended others; and I may have contributed a few myself. Stu McKinney testified he certainly contributed several.

All these added provisions were needed to produce a balanced bill that all parties believed protected the values they were fighting for. I believe this committee should be very wary of a proposal that takes just a few parts of a whole process and tries to make them stand alone. Such a proposal may not even work in a technical sense, and certainly won't balance competing values fairly.

I do not wish to imply that this committee should take the provisions of the Financial Privacy Act lock, stock, and barrel, and apply them to all types of records. Some provisions may not be needed; others may have to be changed; and new ones may be needed. However, all the issues, many of which will appear to be technical, must be addressed if the legislation is to work properly and protect competing values.

I will be examining the proposed charter as it moves through the legislative process and I hope I can offer constructive suggestions when appropriate.

One other aspect of the investigative demand provisions should be considered by this committee.

Last April the President forwarded to the Congress a privacy message; and last Friday I, along with several other members, introduced most of the resulting legislative proposals.

The portion which is not prepared, and which will not be sent up until very late this year, is the bill establishing guidelines for Government access to the entirety of individual records maintained by third parties. The separate legislation for Government access can be expected to build on the procedures established in the Financial Privacy act.

This committee should weigh very carefully the advisability of establishing permanent procedures for the FBI in this legislation, that may be at variance with the general Government access legislation that the Congress will consider in the near future.

This committee is a better judge than I as to the ability of the FBI to conduct its important operations with, for example, additional subpoena powers governed by the existing privacy statutes or the need to provide the FBI with subpoena powers and different procedures for those records not covered by the Right to Financial Privacy Act until the administration's government access legislation can be considered. The end result of the process should be, however, a consistent approach.

I commend this committee and the chairman for their efforts in this legislation, and appreciate the opportunity to present these thoughts to you today.

Mr. EDWARDS. Thank you, Mr. Cavanaugh.

Without objection, the letter you referred to will be made part of the record, and my compliments to both of you for your real important contribution that you're making to this subject.

[The letter follows:]

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., August 3, 1979.

HON. PETER W. RODINO, Jr.,  
Chairman, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We, the undersigned, were prime supporters of the Right to Financial Privacy Act of 1978 which was enacted in the last Congress as Title XI of Public Law 95-630. This Act seeks to govern Federal access to

financial records held by depository and other financial institutions, including access by administrative subpoenas authorized in other statutes.

We have reviewed the administrative subpoena provisions in the proposed FBI charter which your committee will be considering soon, and we are very disturbed by the treatment of the Right to Financial Privacy Act itself, and the ways the charter would govern access to other third party records not now covered by the Financial Privacy Act.

Section 533b(f)(2) of the charter, which is apparently intended to provide that this new subpoena power will be governed by the Financial Privacy Act, states only that such subpoenas are governed by the challenge provisions of section 1105 of the Act. There are other provisions which should also be made applicable if the Act and the charter are to be compatible. For example, section 1112 governs the inter-agency transfer of records obtained under the Act; section 1115 provides financial institutions with reimbursement of their costs of providing records; section 1109 provides that customer notice required under section 1105 may be delayed; and section 1111 requires that financial institutions begin to assemble the subpoenaed records during the customer challenge period.

In addition, section 533b(f)(2) provides that FBI administrative subpoenas covered by the Financial Privacy Act must also comply with guidelines issued by the Attorney General. However, it is unclear what these guidelines are intended to cover. Could they override the protections of the Financial Privacy Act, are they intended simply to govern the internal process the FBI uses to issue such subpoenas, or do they have some other purpose? We think the new charter should make clear exactly what the status of these guidelines will be.

The FBI charter should make clear that the new administrative subpoena power it confers, and the information obtained under it, will be treated the same, in all respects, as any other administrative subpoena authority covered by the Financial Privacy Act.

There are similar defects in the portion of the new charter that governs FBI access to third party records not covered by the Financial Privacy Act. While these provisions bear a superficial similarity to the Act, many of the key issues the Act addresses in detail are ignored by the charter or are resolved in drastically different ways. We think the differences in treatment must either be corrected or convincingly explained before Congress can accept them.

For example, while section 533(f)(6) provides individuals with the right to challenge, in court, FBI access to their records, it fails to make clear to the court how these challenges are to be resolved. Section 1110 of the Financial Privacy Act, by contrast, provides detailed procedures and standards for these situations.

More fundamentally, while section 533(f)(6) appears to give an individual the right to ask a court to quash a subpoena, section 537a(b) of the charter states that no court may have jurisdiction to entertain a motion to quash a subpoena that does not follow the guidelines. As we discovered in considering the Financial Privacy Act, individuals generally have few, if any, rights to challenge government access to records about their activities held by third parties, unless these rights are clearly and unambiguously granted by statute. In this instance, what the statute grants in one section is quickly taken away in another. Which of these diametrically opposed provisions is intended to govern?

Assuming that the individual actually does have the right to challenge an FBI subpoena, it is unclear whether the third party record holder must wait until the individuals' challenge is resolved before surrendering the records. Under the Financial Privacy Act, the financial institution must wait until it receives a certificate of compliance from the government authority seeking the records before it can turn over any records. It is also clear that the government authority cannot issue such a certificate unless the customer has been given his right to challenge and has not done so, or his challenge has been defeated.

Another fundamental difference between the Financial Privacy Act and the proposed FBI charter concerns the provisions for delaying notice to the individual. Though the standards for delays are the same in both instances, under the Act a court must make the required findings before notice can be delayed, while under the proposed charter the Attorney General, or his designee, can delay the notice. Obviously, there is a significant difference between these procedures. This difference should be fully justified before Congress departs from the decision it made in this area when it passed the Financial Privacy Act.

Another difference between this Act and the proposed charter appears in the provisions that permit the individual to authorize a third party to release the records. While the charter simply provides that this may be done, the Act requires that the customer be told which records will be disclosed and why, provides that the customer may revoke the authorization at any time, and limits the period

for which the disclosure is valid. The provision also makes clear that the financial institution cannot require the customer to authorize disclosure, and gives the customer a statement of his rights under the Act at the time he signs an authorization. Why are these safeguards not included in the proposed charter?

While we have detailed some specific deficiencies in the administrative subpoena provisions of the proposed FBI charter, there may be others we have not identified. From our perspective as supporters of the Right to Financial Privacy Act, we Act, we have no objection to providing the FBI with subpoena power to obtain financial records it needs to enforce the law. However, we do not believe this grant of power should be used to cut back on important rights the Congress granted just last year when it passed the Financial Privacy Act. Knowing of the many hours spent negotiating with the Department of Justice over the details of the Act, we appreciate the complexity of these issues. We would like to have the opportunity to work with you to perfect the proposed charger, and to testify on the provisions we have discussed in this letter.

Sincerely,

JOHN J. CAVANAUGH.  
STEWART B. MCKINNEY.  
JOHN H. ROUSSELOT.  
PETE STARK.  
BARRY M. GOLDWATER, Jr.

Mr. EDWARDS. I recognize the gentleman from Massachusetts.

Mr. DRINAN. Thank you.

I echo my praise for the two statements. Would you explain a bit more about the letter that's now apparently being rejected by some banks? Explain what the letter says and why banks are rejecting it.

Mr. CAVANAUGH. Well, it is the procedure for informal access. I can't tell you personally what banks are rejecting it and the basis for their rejection. I suggest in my testimony that inquiry be made of the FBI and the Justice Department to verify that and verify the justification for it.

The difficulty was that we didn't have authority to expand subpoena powers of the FBI and we didn't want to preclude them from all access to financial records with the exception of their going through the grand jury process.

What we tried to do was to devise a system that allowed them to continue access but that established privacy protections for the individual notice and right to challenge. We created this informal process.

Mr. DRINAN. You said the department offered the formal written request procedures as a compromise. Is that in the law?

Mr. CAVANAUGH. It's in the law, in the Right to Financial Privacy Act.

Mr. DRINAN. And the banks still rejected it?

Mr. MCKINNEY. The only information we have that they are rejecting it is from the FBI. Having gone through this process, we thought they protested too much in many instances as to the difficulties they were having.

Originally they were walking in and opening up their wallet and showing identification and saying, give me Drinan's records. So we said, with a letter, at least the bank has the protection of the letter and we know who is asking for it.

Mr. DRINAN. Why are the banks rejecting this?

Mr. MCKINNEY. I don't know that they are.

Mr. DRINAN. That's what Mr. Cavanaugh says. Many banks are not honoring these formal written requests.

Mr. MCKINNEY. That's what the Justice Department tells us.

Mr. CAVANAUGH. That contention should be examined. I know of no reason why the banks should reject it. The banks are relieved of any obligations to their customers if these are certified. The FBI must comply with the provisions of notice themselves to the customer.

In addition, the financial institution is to be reimbursed for the cost of compiling and providing the records to the agency. The only possibility is that there is no coercive power in connection with the formal written request. There's no enforcement mechanism, so there is the possibility, of course, that an institution can reject it.

In terms of any—I know of no good reason other than an arbitrary decision, and the Justice Department may well make the argument they don't want to be subjected to that type of arbitrariness.

I don't urge this committee to reject that out of hand, but I say we did build a procedure in, that was requested by the Department of Justice, and that maintains the protections for both the pursuit of legitimate law enforcement access to information and the rights of individuals to notice and opportunity to object. You should look into and investigate whether or not it works, and why it doesn't work, if it doesn't.

Mr. DRINAN. Do you have any information that the FBI in other instances simply flashes their badges and are still able to get information?

Mr. CAVANAUGH. I think not.

Mr. DRINAN. They don't attempt to do it that way any more?

Mr. CAVANAUGH. I have no information that they make those—that they would have made those efforts since the Financial Privacy Act has become law and I would seriously doubt they would.

Mr. McKINNEY. Inherent in our testimony is the hope this committee will look into how they are getting telephone records, employment records. The abuse of employment records is severe. All of those things, it's vital. We're sort of saying that some system be set up for those records.

Mr. CAVANAUGH. I want to add one caveat to that. The badge flashing. The Right to Financial Privacy Act doesn't cover State and local governments and we don't know what the extent of that kind of informal access may be continuing.

Another aspect of that, a concern we were never able to address, was the use of local law enforcement—access to local law enforcement information by Federal law enforcement agencies. I think that's something that—

Mr. DRINAN. My time expired.

I thank you again, particularly for the ongoing counsel you will be giving to us if and when this legislation emerges.

Mr. EDWARDS. Gentleman from Illinois, Mr. Hyde?

Mr. HYDE. Thank you.

I too salute my two colleagues, and am quick to point out I'm a member of the distinguished Banking Committee and bask in their reflected glory. I am proud of you gentlemen. Jack Anderson's getting the grand jury minutes doesn't shake you up, does it?

Mr. McKINNEY. It does very much, yes. Jack Anderson, as far as I'm concerned, has no more right to anyone's private records than anyone else without proper access.

Mr. HYDE. Good; I share that view.

You mentioned there was some question as to whether banks were or weren't cooperating with these informal requests, asserting that that's what the FBI has been saying.

We will hear shortly from Robert Ellis Smith, publisher of Privacy Journal. He states in his statement that conscientious financial institutions are doing just that; they are insisting on a subpoena or search warrant.

Citi-Bank of New York apparently tells its customers flatly,

As a matter of policy we will not honor formal written requests. We won't release the information unless the law requires us to.

The Riggs National Bank in Washington says,

This bank does not reveal information concerning its customers to third parties except upon service of a subpoena or a court order. When a subpoena or court order has been served, it is the bank's policy to advise our customer of the service.

The American Telephone & Telegraph Co. says,

No Bell System Telephone Co. will turn over customer long distance records to government or law enforcement agencies or legislative committees except under subpoena or administrative summons.

So evidence apparently does exist outside of the FBI, which indicates that the informal requests aren't working. At least, three sources say so.

I have no further questions except to say that you have raised some very important points and they will have to be resolved. Your points of view will certainly be studied very carefully by this member.

Mr. MCKINNEY. I hope the committee will excuse me. I have to go on the Chrysler Corp's financial records.

Mr. HYDE. Don't give an inch. [Laughter.]

Mr. CAVANAUGH. Just to briefly react to that again, we are not saying that there isn't a potential problem in the formal written requests. We're saying we'd like this committee to look at it specifically. The resolution in terms of the new subpoena power—I think this is the crux of my testimony—is that we hope the committee will try and pursue this in a manner that's consistent with the balances that were arrived at in the Right to Financial Privacy Act.

Those balances are sound ones and we simply ought to include in your consideration the totality of the Right to Financial Privacy Act and all the trade-offs that exist in there; because I think our experience there is that there is a complex area. To try to lift one or two segments and say you accommodate those interests is most difficult and dangerous.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. Thank you, Mr. Chairman.

Good morning, John. I know, in going through your and Stewart's testimony, that your main objections are to the question of notice, interagency transfer, possibility of cost of gathering information, reimbursement, and as to details.

You generally, I believe, agree that we have to find some avenue short of making them go to a grand jury and get a subpoena, and yet not, like you say, flashing a badge. It won't be too easy. You have to protect everybody's right and let them have the information they need to prosecute white collar crime.

Mr. CAVANAUGH. If there is no cooperation within the community and acceptance of that, then, of course, it won't work. That is what we

are finding, if institutions—if we are able to devise a mechanism that serves both law enforcement interests and the individuals' privacy interests and yet it is not participated in by the maintainers of the information, then, of course, it won't work.

I think that you do have a difficulty there in trying to resolve that. One, that at the time the Banking Committee considered this legislation we considered to have resolved safely—we didn't anticipate that if you relieve the financial institution of any legal obligation and you provide them exemption for the ministerial burden of providing information, they would have any objection.

Some institutions apparently have found that it is also a marketing mechanism to say that in this bank their records are not absolutely secure and we will have to work around that, or you will have to work around that.

MR. VOLKMER. Make it, perhaps, mandatory. We do have provision for—in other words, if there is delay in giving notice in the charter, there is a provision for the Attorney General or designee to delay the notice if they find the same things found in the Privacy Act. So you have no objection to the Attorney General being able to do that? Or do you have objection?

MR. CAVANAUGH. To a delay notice? I think, again, you are going beyond the nature of records that we considered in the Financial Institution Privacy Act. We simply raise that as an issue that you are going to have to consider, that there is a possibility of circumstances in which the individual perhaps should not be given notice in advance of the access to his records and we have to at least consider procedure for accommodating those circumstances.

You may reject it out of hand and say the person should as of advanced notice, and we certainly debated that aspect. What I am saying is in your charter that issue is not raised and not addressed and it is one that certainly arises that we had to conform to, and we resolved it in this fashion, in a fashion I became convinced was a reasonable fashion.

We closed the door on delayed notice and created specific procedures for accommodating those instances in which a delayed notice was requested by the Government.

MR. VOLKMER. We have a procedure. We have a provision in the proposed charter that the Attorney General or his designee may delay the notice for one or more successive periods not to exceed 90 days if he finds that—using the same verbiage, I believe—and the request for delay in any written findings shall be made with reasonable specificity.

So the question then is: Is that sufficient protection for the individual?

MR. CAVANAUGH. You reside the power in the Attorney General.

MR. VOLKMER. Or his designee.

MR. CAVANAUGH. We place it in the court. Again, it is a matter of consistency, trying to get as much consistency in the law as we move through the whole area of privacy.

MR. VOLKMER. Thank you very much.

MR. EDWARDS. Gentleman from Wisconsin, Mr. Sensenbrenner?

MR. SENSENBRENNER. While talking about the various competing rights and responsibilities set forth in this bill, I am wondering if you believe that the rights of record custodians have been adequately clarified.

They often get caught in the middle between the customer and Government in a dispute over these records and possibly subject themselves to liability.

Mr. CAVANAUGH. It was a major consideration of the Banking Committee in the construction of the right to Financial Privacy Act. We wanted to take the custodian completely off the hook to the extent possible. I think the operative theory of any privacy legislation involving third-party custodians, involving Government individuals and third-party custodians, is that the basic relationship is between the Government and the individual and the custodian is merely that, a ministerial intermediary, whose liability should be minimized and should be clearly limited. So the procedure should be one that results in the fact that the Government seeking access should bear the burden of a lack of compliance with the standards, and not the custodian. He is given a certificate of some form saying he has complied with the appropriate procedures. Then the custodian should be absolved of any responsibility.

Mr. SENSENBRENNER. There is provision in the legislation which reads as follows:

No cause of action shall lie in any court against any person, corporation, partnership, association, or other entity or against the supervisors or employees of such an entity by reason of good faith reliance upon an investigative demand issued by the FBI in accordance with this statute.

Do you think this adequately protects the rights of record custodians or goes too far by establishing the good faith standard rather than a standard which permits compliance with whatever procedures are used?

Mr. CAVANAUGH. It is good faith. I think that is basic. I think that is the same standards we used and I think that is the appropriate one.

Mr. SENSENBRENNER. I have no further questions.

Mr. EDWARDS. Do you think that all of the criminal investigative agencies of the Federal Government should have one law that would provide for this access with proper protection attached to it?

Mr. CAVANAUGH. As I say, Mr. Chairman, I don't think I am in a position to make judgment on that. The best judgment I can make is, we spent 2 years on the Right to Financial Privacy Act. That process is extremely instructive in terms of complications just with that relatively narrow set of records. There may well be other considerations when you get into telephone records and the other spectrum of records that this committee is considering.

I am not in a position to say, and I didn't say in my testimony, the Financial Privacy Act considered all the possible concerns. You may even reevaluate some of those that we did.

Basically I am saying please take the totality of what we considered in your deliberations. As you go beyond that, I think there is much good there and much well deliberated and exhaustively debated balancing of interests. We hope you will include those in your considerations.

I am not sure that—in fact, I would probably guess that you could not make one uniform set of standards for all types of records and all types of relationships. We seek to define the appropriate responsibility between the Federal Government, the custodian, and the individual.

There are many different criteria to be evaluated.

Mr. EDWARDS. Your testimony is that the provision in the proposed charter doesn't protect the rights of people. An FBI agent wanting

private information can delay notification one way or another. Isn't that correct? He can make the investigative demand—isn't it correct when he makes the investigative demand, the subject doesn't have to be notified until 30 days?

Ms. LEROY. They have to be notified and they are given 10 to 14 days to respond unless the Attorney General is willing to delay notice for 90 days.

Mr. EDWARDS. In-house judgment can be made to delay the notification to the subject. Would it be your testimony that it shouldn't be in-house, that it should be a magistrate or judge?

Mr. CAVANAUGH. We took it out of house in the Right to Financial Privacy Act. I do believe that that is a sounder process and procedure.

Mr. EDWARDS. Do you think the subject should have representation that he doesn't know about?

Mr. CAVANAUGH. I can't say that is a new question.

Mr. EDWARDS. Well, to make it more reasonable, that the magistrates or whoever it might be just start rubber-stamping these things. That is always a danger.

Mr. CAVANAUGH. Well, it is. We spent many, many hours debating this in our negotiations with the Justice Department. I think it was one of the most difficult areas. I think you have to start back to—what your guiding principle is is a right to know; and a right to challenge access is what we are seeking to establish as a fundamental right.

There is an erosion of that right. To say that there are circumstances in which overriding considerations of individual safety or whatever have to be acknowledged and accommodated within the law, the process and procedure for accommodating those unusual circumstances should be a rigorous one, and we felt the magistrate was as rigorous as you can get, realizing any of us practicing law realize there does develop in many instances an intimacy between magistrates and law enforcement agencies, and that sometimes too much acquiescence and faith in the law enforcement agency by the magistrate, that is not an appropriate relationship as we understand the structures of our government.

It is a human condition. It is difficult to say how you overcome that.

You are now suggesting, I take it, injecting a third party advocate unbeknownst. I never considered that before. It's a possibility. Certainly I feel the delayed notice is an extreme exception which should be treated most rigorously to continue the protection of the individual.

Mr. EDWARDS. Under the charter, the subject of a mail cover does not have to be notified at all. Mail covers are just licensed. Do you know what a mail cover is? A mail cover is where we will say an FBI agent asks the post office to make note of the return addresses of mail to the subject for a period of 30 or 90 days and then deliver it to the FBI where it came from. Do you think that should be subject to some procedures and process before the post office can provide that service?

Mr. CAVANAUGH. Again, I don't think that I am—it's a new matter for me. I don't know that I would—my impression would be yes, there should be some protection there.

Mr. EDWARDS. My time is up.

Mr. DRINAN. Mr. Cavanaugh, would you illuminate me as to how the SEC and IRS handle this question? Did that come up in your deliberations?

Mr. CAVANAUGH. The SEC was exempted out of the Right to Financial Privacy Act. Under the terms of their exemption, their exemption will expire in November 1980 so they must come back to this Congress and get an affirmative extension of their exemption. Otherwise they will come under the terms of the Right to Financial Privacy Act.

The IRS, of course, is covered by separate legislation enacted in 1976 before I came to the Congress and their provisions are analogous—we built on those provisions. I think Congressman Stark was the primary architect of those in the Ways and Means Committee, but again they do parallel the procedures of the Right to Financial Privacy Act in terms of notice, challenge, and time limits. In fact, we tried to follow those time limits very closely.

That brings us to our testimony today that we hope that we will try in each of these instances to have as much consistency in all of this legislation as is possible, recognizing there will be variance, depending on the subject matter.

Mr. DRINAN. Did the Drug Enforcement Agency have any powers that are parallel or would they be simply under the Justice Department?

Mr. CAVANAUGH. They fall within the protections of the Right to Financial Privacy Act. The only Government agencies exempted from the Right to Financial Privacy Act are the limited exemption, the delayed exemption of the SEC and IRS, who are covered by their own acts.

Other than that, all law enforcement Government agencies fall within the Right to Financial Privacy Act when they are seeking access to financial records.

Mr. DRINAN. Would you feel the exemption of the SEC should be abrogated come next year?

Mr. CAVANAUGH. Definitely. I was not for it.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. Any further questions? Counsel?

Ms. LEROY. Mr. Cavanaugh, it's my understanding that the Financial Right to Privacy Act contains a provision restricting release of the records during the initial notice period so that—I don't know how long the period is, 14 days or whatever, that the individual has the right to challenge—the custodian can't release the record; is that correct?

Mr. CAVANAUGH. That's correct.

Ms. LEROY. There is no such provision in the FBI charter. Would you suggest adding such a provision? In other words, the bank or whatever, the insurance company could go ahead and release the records and then if the subject decided to challenge, the records would already be released.

Mr. CAVANAUGH. Yes; I am not aware of that but, yes, I would recommend that.

Ms. LEROY. That is all.

Mr. BOYD. Is it fair to say that your major concern is the in-house nature of the investigative demand and that you believe a magistrate should be involved in the issuance of process or, in the alternative, some sort of court mechanism?

Mr. CAVANAUGH. My major substantive concern with differences between the Financial Privacy and charter, I would think that is a major concern of ours. I don't want to minimize the other aspects

Mr. BOYD. But isn't it true that under the FBI charter third-party custodians are lawfully permitted to refuse to turn over records and if they do, the FBI will be forced to go to a magistrate and get a court order?

Mr. CAVANAUGH. Under the charter?

Mr. BOYD. Under the charter provisions. If the custodian refuses, then there will be a hearing before a magistrate, at which time the FBI, should it meet the burden of proof, will receive a subpoena which it can deliver to the third-party custodian requiring him to turn over the requested information.

Mr. CAVANAUGH. That is—

Mr. BOYD. My point is they are permitted to refuse if they believe the information to be nonrelevant and the FBI will have to go to a magistrate to confirm the need for the requested material.

Mr. CAVANAUGH. I am not sure what you want me to comment on.

Mr. BOYD. My only purpose in asking the question is that you indicated a concern that magistrates should play a role in the issuance of subpoenas requesting information from third-party custodians.

Mr. CAVANAUGH. We are talking about in the delayed notice process? That was the contest.

Mr. BOYD. OK, thank you.

Mr. EDWARDS. I don't see that. I see on page 23, line 19, it says—

Well, if there are no further questions, thank you very much for excellent and most helpful testimony.

Mr. CAVANAUGH. Thank you.

Mr. EDWARDS. We will recess for a vote and come back in 10 minutes.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

Our last witness today is Robert Ellis Smith, publisher of the Privacy Journal, a highly respected periodical in the field of privacy.

Mr. Smith is the author of numerous articles and books on this subject.

Mr. Smith, we are pleased to have you here. You may proceed.

### **TESTIMONY OF ROBERT ELLIS SMITH, PUBLISHER, PRIVACY JOURNAL**

Mr. SMITH. Thank you. There has always been a delicate balance between fourth amendment protections and the need of law enforcement. The proposed charter tips that balance in a subtle and technical way. The constitutional arguments raised are extremely important but the thrust of my testimony is on pragmatic concerns.

First, what I tried to do is compare the charter to the abuses that led to it in the first place. One of those was the fact that the FBI was not accountable to an outside dispassionate overseer. Another was that the Bureau's information was inaccurate. It was usually irrelevant to the investigation.

If Congress is to reform the Bureau it must provide for outsiders to approve sensitive FBI activities and must find a way to make FBI information more reliable. As has been pointed out earlier, one of the things the investigative demand provision does is upset a tradition of having separate branches of government approve intrusions into the private lives and personal effects of American citizens.

The investigative demand provision would permit the FBI to make copies of personal information in the hands of an insurance company, phone company, or financial institution merely upon the presentation of an investigative demand. No prescribed format for this demand, no judicial oversight, no time limit, no specificity, no requirement even that it be signed.

This is similar to the Code of Criminal Procedure in the largest union of the Soviet Union, which says on the matter of collection of evidence that

A person conducting an inquiry, an investigator, procurator and court shall have the right in cases conducted by them \* \* \* to demand that institutions, enterprises, organizations, officials, and citizens furnish articles and documents capable of establishing factual data necessary for the case.

The Soviet Code is even more restrictive on the dissemination of that information than is the FBI proposed charter. It's true the charter would limit FBI dissemination of information to regulations under the Privacy Act but those, under the routine use exception in the act, are extremely loose.

One of the great abuses that led to this charter involved the leaking of derogatory information to credit bureaus, relatives, employers and others; the Cointelpro abuses. I am trying to take a pragmatic approach to this. What concerns me most is we are opening up to routine access very unreliable sources of information.

By "credit institution," I presume the FBI means a credit bureau and consumer reporting company. The consumer reporting companies gather information from neighbors and coworkers for purposes of insurance applications, claims for insurance coverage, and employment.

One arm of the Federal Government, the Federal Trade Commission, said the leader in the field, Equifax, is inaccurate in its reporting and unable to comply with the Fair Credit Reporting Act's provision that such companies "follow reasonable procedures to assure maximum possible accuracy."

By way of example, one of the instructions to Equifax investigators is if they are not able to verify information they simply report it anyway and say there is "talk in the community that your subject has had police difficulties."

One arm of the government says the compilers of this information are notoriously inaccurate. Yet Congress may be sanctioning routine access to this unreliable information. We ought to be doing the opposite. We ought to be providing, if we have to, routine access to the FBI to sources of reliable information, and tighten up its access to sources that are unreliable.

Besides credit institutions, the FBI Charter would permit investigative demands upon insurance companies, which are the major users of these same unreliable consumer reports.

Further, the records of financial institutions, though they may be strictly speaking accurate, are very misleading. It has been said that the financial records, the information on the front and back of one's check are a mirror of one's life, but if that is true it is a distorted one. The checks one makes out are not necessarily a reflection of his political views, tastes, spending habits, borrowing, charitable contributions and the rest. I would hate to have an FBI agent taking information from my checking account, putting two and two together and getting six.

Telephone numbers are not a very good source either. I am curious why the FBI hasn't taken care of its access to employers, landlords, health facilities and the like. It may be that it expects legislation in the insurance, financial, and credit fields.

If the investigative demand provision remains in the charter, at least FBI access should be extended to information in third party records, not copies of the information. This is in accord with the Privacy Protection Study Commission recommendation that "When government seeks a copy of a record, it would have to use legal process." However, the commission said, "The commission does not intend through this recommendation to cutoff an investigator's ability to seek testimony of parties with whom an individual under investigation may have had contact. It is not the intent of the commission to create a new testimonial privilege for bankers, insurers or anyone else. Rather, it seeks to protect documentary information about individuals which, were not for the 20th century changes in social and economic organization, would have remained the private and protectible records of the individual. The observations of the recordkeeper and his employees concerning the actions of the individual which appear to be illegal are not, in the commission's opinion, protectible information.

Let the FBI agents get all the verbal tips and information they can without legal process but require them to go to a U.S. attorney when the time comes to take and copy documentary evidence about individuals.

In paragraph 2, the charter would in effect extend to the FBI the power of administrative subpoena with regard to financial records, a power that it has not heretofore had. The first sentence in paragraph 7 is the most dangerous. The Right to Financial Privacy Act provision on government access is a seriously defective model but at least it permits the third party to use its good judgment in compliance with a formal written request.

In other words, the financial institution can send the investigator back to get proper legal process. Conscientious financial institutions are doing that. Citibank published a brochure on privacy in which it said as a matter of policy they will not honor formal written requests and won't release the information unless the law requires them to. I think these policies make sense. First they are in the interest of the privacy of the depositor, and that is the main inspiration for them.

Second, the financial privacy law says that compliance with a formal written request is not mandatory.

Next, a financial institution might find its immunity under the Right to Financial Privacy Act is more limited and it might be subject to liability if it did voluntarily comply with a formal written request.

The fact that an investigative demand is made mandatory upon the institution is the key point.

The section that sanctions certain distasteful investigative techniques should be looked at sharply. We should not necessarily assume each of those techniques has been sanctioned totally by the courts in every jurisdiction. I would suggest adding to that language that what are called sensitive investigative techniques be carried out "only in accordance with applicable law" as the wiretapping section reads.

I mentioned the proposal about dissemination. I think the Privacy Act, all things being equal, would be a good standard but the regulations as drafted by the FBI are full of loopholes. The FBI proposal

would permit destruction of the information it gathers only 10 years after closing of an investigation. It is interesting to note the Fair Credit Reporting Act, which governs the consumer reports the FBI is seeking, calls for destruction after 7 years. So it would be possible for the FBI to get my credit bureau report, for example, and hold on to it for 10 years. The credit bureau itself would have to destroy that information after 7.

I think it's dangerous to rely on the formal written request provisions in the Financial Privacy Act as a precedent. As Congressman Cavanaugh's testimony has pointed out, it was hammered out in the days of the 95th Congress. It was never intended as a model. This language has been further watered down to an "investigative demand" and been made mandatory upon the institution. I think the charter is a reasonable basis for hammering out better language, however, and I am hopeful this subcommittee and others will work to bring about language to protect privacy and not only permit but also require quality law enforcement.

[Complete statement of Robert Ellis Smith follows:]

TESTIMONY OF ROBERT ELLIS SMITH, PUBLISHER OF PRIVACY JOURNAL,  
WASHINGTON, D.C.

There has always been a delicate balance between the people's right to remain secure in "their persons, houses, papers, and effects" and the government's need to investigate and prove criminal violations. The proposed "FBI Charter" upsets that delicate balance in seemingly subtle and technical ways. If it approves the charter as drafted by the FBI, the Congress will be sanctioning investigative techniques by federal agents that have previously been regarded as illegitimate.

As publisher of Privacy Journal, an independent newsletter reporting on the confidentiality of personal information, I have analyzed H.R. 5030 by comparing it to the abuses that led to its need in the first place. One of those abuses was the fact that the Federal Bureau of Investigation was not accountable to an outside, dispassionate overseer. Another was that the bureau's information was essentially inaccurate, usually irrelevant to legitimate criminal investigations. Thus, if Congress is to truly reform the Bureau, it must provide for an outsider to approve sensitive FBI activities and it must find a way to make FBI information-gathering accurate and relevant.

To a person concerned about individual privacy, the "investigative demand" for personal information held by third parties is particularly worrisome. One safeguard for individual privacy and freedom has been the assurance in American constitutional law that separate branches of government have had to approve intrusions into personal effects. The judicial branch, in the form of a judge or magistrate, would warrant the search; and the executive branch, in the form of the local police or FBI, would execute it. The executive branch, in the form of a district attorney or U.S. attorney, would assess the evidence seized and seek an indictment. The judicial branch, in the form of a grand jury, would (theoretically) decide whether the evidence warranted indictment and protect the confidentiality of the information gathered. The executive branch would use the evidence to prosecute, and the judicial branch would weigh the evidence and determine guilt or innocence.

The "investigative demand" section of the FBI proposal breaks with that tradition. It permits one agency to warrant and execute the search, decide upon its use, and dispose of the information collected. It is an officially sanctioned search for personal information that requires no judicial imprimatur.

THE STANDARD IS TOO LOOSE

Section 533b(f) would permit the FBI to make copies of personal information in the hands of an insurance company, telephone company or financial institution merely upon presentation of an "investigative demand." There is no proscribed format for this "demand," no judicial oversight, no time limit, no specificity (information need only be "reasonably described"), no requirement even that it be signed.

This is similar to the scheme in the Code of Criminal Procedure for the largest of the 15 unions in the Union of Soviet Socialist Republics (USSR). Article 70 of the code reads:

*Collection of evidence.*—A person conducting an inquiry, investigator, procurator, and court shall have the right in cases conducted by them to summon, in accordance with the procedure established by the present Code, any person to be interrogated or to give an opinion as an expert; to conduct views, searches, and other investigative actions provided for by the present Code; to demand that institutions, enterprises, organizations, officials, and citizens furnish articles and documents capable of establishing factual data necessary for the case; and to demand that inspections be carried out.<sup>1</sup>

In the matter of seizing postal or telegraph records, the Soviet code has language that is more restrictive than the FBI proposal. Article 174 reads:

*Seizure of postal and telegraphic correspondence.*—The impounding of correspondence and its seizure at postal and telegraph offices may be carried out only with the sanction of a procurator or in accordance with a ruling or decree of a court.

When it is necessary to impound correspondence and to conduct a view and seizure of it, an investigator shall render a reasoned decree to such effect. After approval of said decree by a procurator, the investigator shall refer the decree to the proper postal and telegraph office, shall propose that it hold the correspondence, and shall notify it of the time of his arrival to view and seize the correspondence. . . ."

This investigative technique in the Soviet code requires a formal written document and the approval of the "procurator," a quasi-judicial officer.

In regulating the dissemination of information by the investigator, the Soviet code has language more restrictive than the FBI proposal. Article 139 reads

*Impermissibility of divulging data of preliminary investigation.*—The data of a preliminary investigation may be given publicity only with the permission of an investigator of procurator and only to the extent to which he deems it possible. When necessary the investigator shall warn . . . persons present at investigative actions of the impermissibility of divulging the data of the preliminary investigation without his permission.

Compare this with the lack of any meaningful limits on FBI dissemination of information it gathers, Section 533c(b)(5). The proposed charter would do little to prevent repeats of the Cointelpro abuses, in which FBI agents freely circulated gossip to credit bureaus, news organizations, relatives, employers and others.

(I do not mean to imply that Soviet law enforcement practice conforms to its code, nor that its code is a fair one. I do mean to imply that we in the United States can do better. I do mean to imply that Congress would be wrong to give such leeway to any agency in the U.S. government, even to an agency whose record in the recent past had been a favorable one.)

#### UNRELIABLE SOURCES OF INFORMATION

It is curious that the bureau included in its "third party" provision only an insurer, financial institution, telephone company, and "a credit institution." What standard governs FBI access to personal information in the hands of an employer, a landlord, a local government agency, health facility or other third party? By "credit institution," I presume the FBI means a credit bureau and a consumer reporting company. The latter gathers subjective information from neighbors and co-workers about a person who has applied for insurance coverage, an insurance claim, or a job. These reports are sold to insurance companies and employers. These reports are also subject to the Fair Credit Reporting Act, which prohibits their disclosure (to law enforcement) except "in response to the order of a court."<sup>2</sup> Even a subpoena from a grand jury has been found insufficient to permit a consumer reporting agency to disclose personal information.

If Congress sanctions the routine access to consumer reporting agencies' files by FBI agents, it is sanctioning the compiling of still more inaccurate hearsay by the bureau. A Federal Trade Commission administrative judge has found Equifax, Inc., which sells more than 70 percent of the consumer reports produced in the nation and dominates the industry, in violation of the Fair Credit Reporting Act requirement that such companies "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about

<sup>1</sup> Berman, Harold J. "Soviet Criminal Law and Procedure: The RSFSR Code." Cambridge, Mass., Harvard University Press, 1972, p. 225.

<sup>2</sup> 15 U.S.C. 1681, section 604(1).

whom the report relates." The administrative judge found, "The record shows that production requirements, time pressure and (Equifax's) quality audit system have the potential for resulting in inaccurate reporting \* \* \* such methods are likely to result in inaccurate reporting."<sup>3</sup>

The administrative judge in his opinion cited this instruction issued by Equifax to its employees:

If we develop information that there have been arrests, indictments, or convictions, but local police records are not available for confirmation, we should still report the information. But, when reporting the information, put it in the same language as we developed it, such as, 'there is talk in the community that your subject has had police difficulties, but police records are not available locally to verify this information.' It is important, however, that the approximate date of the difficulty be estimated and recorded because of the seven year requirement imposed on reporting adverse information.<sup>4</sup>

Do we really want even more of this speculative "community talk" floating in FBI file cabinets and computers? It is precisely because this information is so unreliable that there must be outside safeguards on the FBI's collection, use and storage of such gossip.

The major users of consumer reports are insurance companies. The proposed charter would permit routine access to their files as well. It is interesting to note that on October 2, 1979, the Department of Commerce announced its proposed "Fair Insurance Information Practices Act," which would limit the disclosure of personal information in the files of insurance companies except among other instances, "at the request of a government authority except that where existing statutes or any rules, regulations, or orders pursuant thereto apply, access must be consistent with them."<sup>5</sup>

Nor are personal records held by financial institutions any more reliable. They are notably subject to misinterpretation. As Associate Lewis F. Powell said in a 1974 case, "Financial transactions can reveal much about a persons' activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."<sup>6</sup> But that is only half the story. Bank records, in fact, are a distorted mirror of one's life. A check payable to a particular publisher does not necessarily mean that the bank customer subscribes to the political views of the publication he or she has ordered. Large weekly checks payable to a liquor store ought not necessarily to imply large liquor consumption. Checks made out to relatives, charities and others are easily subject to misinterpretation.

By the same token, telephone toll logs showing a call to a news organization do not prove that a telephone customer leaked information to a reporter nor even that the telephone customer made the call himself or herself.

Do we really want to give increased circulation to this speculative information that is found in consumer reports, insurance and bank records? Or do we want our chief law enforcement agency to resort to these sources of information only in selected circumstances with the approval of a U.S. attorney and with documented paperwork of the search?

#### PROPOSED CHANGES

I would recommend these minimal changes in the proposed Charter provision on "investigative demands":

If the investigative demand provision remains in the charter, then FBI access permitted in paragraph (f) ought to be extended only to information in third-party records, not to copies of the information. This is in accord with the recommendation of the Privacy Protection Study Commission that "when government seeks a copy of a record . . . it would have to use legal process." ("The Commission does not intend through this recommendation to cut off an investigator's ability to seek the testimony of parties with whom an individual under investigation may have had contact.")<sup>7</sup> ("It is not the intent of the Commission to create a new testimonial privilege for bankers, insurers, or anyone else. Rather,

<sup>3</sup> In the matter of Equifax, Inc., Docket No. 8954, Initial Decision, Nov. 11, 1977, Federal Trade Commission, p. 241.

<sup>4</sup> *Ibid.*, p. 181.

<sup>5</sup> Section 3(3) (C) of the bill, introduced as H.R. 5559.

<sup>6</sup> Privacy Protection Study Commission, "Personal Privacy in an Information Society," Washington, D.C., Government Printing Office, 1977, p. 365.

<sup>7</sup> Privacy Protection Study Commission, "Personal Privacy in an Information Society," Washington, D.C., Government Printing Office, 1977, p. 365.

the Commission seeks to fashion protection for documentary information about individuals which, were it not for Twentieth Century changes in social and economic organization, would have remained the private and protectible records of the individual. The observations of the record keeper and his employees concerning the actions of the individual which appear to be illegal are not, in the Commission's opinion, protectible information.") (7)

In other words, let FBI agents get all the verbal tips and information they can without legal process, but require them to go to a U.S. attorney when the time comes to take and copy documentary evidence about individuals.

The clause permitting investigative demands, as well as paragraph (2) pertaining to financial institutions, should be deleted. The effect of (2) is to give the FBI the power of administrative subpoena with regard to financial records, a power it has not heretofore had. Because of the bureau's accessibility to the U.S. attorney's powers of legal process, there has never been a reason to extend this power to the bureau.

Paragraph (3) pertaining to investigative demands should be deleted. In paragraph (5), an outside authority, not the Department of Justice, ought to have the power to delay the notice requirement.

Paragraph (5)(C)(v) adds a loophole borrowed from the Right to Financial Privacy Act's provision for a "formal written request." This would permit the FBI to waive the notice requirement if notice to the customer would seriously jeopardize an investigation. What law enforcement officer would not seriously believe that the notice requirement would seriously jeopardize an investigation?

The first sentence in paragraph (7) is the most dangerous of all. The Right to Financial Privacy Act provision on government access is a seriously defective model, but at least it permits the third party to use its good judgment in complying with a formal written request. It can send the investigator back to get proper legal process. Conscientious financial institutions are doing just that. They are insisting on a subpoena or search warrant. Citibank of New York City tells its customers flatly, "As a matter of policy, we will not honor Formal Written Requests. We won't release the information unless the law requires us to." The Riggs National Bank in Washington says, "This bank does not reveal information concerning its customers to third parties except upon service of a subpoena or court order. When a subpoena or court order has been served, it is the bank's policy to advise our customer of the service." The American Telephone and Telegraph Company says, "No Bell System telephone company will turn over customer long distance records to government or law enforcement agencies or legislative committees except under subpoena or administrative summons. In addition, the Bell companies automatically will notify customers when their records have been subpoenaed or summoned, except in those circumstances where the agency requesting the records directs the company not to disclose, certifying that such notification could impede its investigation and interfere with the enforcement of the law."<sup>8</sup>

These policies make good sense, and the FBI is attempting to override them with its proposal that a response to an investigative demand be mandatory.

Paragraph (9) should be deleted. The possibility of liability for the wrongful release of customer information makes the record keeper aware of its responsibility. It deters irresponsible information dissemination.

Section 533b(h) sanctions certain distasteful investigative techniques. The Congress should be extremely careful before legitimizing such conduct by the federal government. At the very least, it ought to grant permission only to the extent that it grants permission for wiretapping and bugging (Section 533b(e)), by adding at the end of (h) ". . . and only in accordance with applicable law." Some of these investigative techniques require a warrant in some jurisdictions.<sup>9</sup>

In Section 533c(b)(5), the FBI proposes that dissemination of all the information it gathers from third parties should be governed by the Privacy Act of 1974 5 U.S.C. 552a. FBI regulations under the "routine use" provision of the Privacy Act are so loose, however, as to permit widespread dissemination of the information, at least to other government agencies.<sup>10</sup>

<sup>8</sup> *Ibid.*, p. 358.

<sup>9</sup> Citibank, Privacy, New York, N.Y., 1979, p. 13. Riggs National Bank, letter to a customer, in Privacy Journal files. American Telephone and Telegraph Co., press release, Feb. 15, 1974.

<sup>10</sup> The U.S. Supreme Court has only recently said that installation of a pen register, a device that records the numbers of telephones dialed from a target's own telephone, requires no warrant. *Smith v. Maryland*, 442 U.S. —, 99 S.Ct. 2577 (June 20, 1979). Courts in California have held that electronic location detectors ("hamper beepers") require a warrant, *People v. Smith*, 21 CrL 2078 (Ct. App. Calif., 1977), and that warrantless searches of a person's trash are impermissible, *People v. Krivda*, 486 P.2d 1262 (1973). These cases are in the distinct minority.

The FBI proposal in paragraph (c), would permit destruction of the information it gathers only ten years after the close of an investigation. Destroyed information can do no harm to the individual, and the Privacy Protection Study Commission recommended prompt destruction of government records about individuals when they no longer served a purpose. The FBI charter should encourage the prompt destruction of information about individuals, once the investigation has ended.

The "formal written request" provision in the Right to Financial Privacy Act was invented in the final hours of the 95th Congress. It was never intended to be a model. It covered financial records, which the Supreme Court in 1976 had said afforded no "legitimate expectation of privacy." Now, this defective precedent has been weakened to an "investigative demand," and applied to personal information that is more sensitive than that found in financial records—telephone calls, consumer reports, credit records, health information and hospital reports in the files of insurance companies.

I am confident that with careful drafting and unwavering consideration for the Bill of Rights, members of this subcommittee, the Judiciary Committee in the Senate and the Department of Justice can produce a charter that permits—and indeed mandates—effective law enforcement.

Mr. EDWARDS. Thank you very much.

The gentleman from Massachusetts?

Mr. DRINAN. Thank you. I too want to thank Mr. Smith. The more I read this charter, the more frightening it is. If I may just read one sweeping claim that the FBI is making on page 25, the FBI may use other sensitive investigative techniques such as trash covers, pen registers, consensual monitoring, electronic location detectors, covert photographic surveillance, and pretext interviews.

I would assume you would have serious privacy problems with all those things, too.

Mr. SMITH. Perhaps not pretext interviews, but the others, definitely.

Mr. DRINAN. These things aren't even defined. That is another difficulty with the charter. As I hear you, you are not really satisfied with the compromise of the Banking Committee. You would want more.

Mr. SMITH. Yes.

Mr. DRINAN. When you say on page 6, "I would recommend these minimal changes," if those were made, would it be acceptable to you?

Mr. SMITH. Well, that is hard to say. In some ways no charter may be better than a defective charter.

Mr. DRINAN. That is my feeling at the moment. Why institutionalize something that, as you saw so well, the power the FBI has not heretofore had and is being requested.

What do they do at the State level? Are there any comparable privileges given to New York police?

Mr. SMITH. No. They go to the DA.

Mr. DRINAN. This would be unprecedented, to write its own administrative subpoenas.

Mr. SMITH. That is my understanding.

Mr. DRINAN. This is very important. Do they have anything like this in English law?

Mr. SMITH. I don't know. I am not qualified to say.

Mr. DRINAN. I am sure you are qualified. It would be helpful to me and the subcommittee to find that out. Is this an unprecedented claim that, as you put so well, that this investigative demand is entirely unknown in American law?

Mr. SMITH. Certainly the investigative demand is entirely unprecedented. There are agencies of government in the executive branch that have administrative subpoena power.

Mr. DRINAN. Which?

Mr. SMITH. SEC does.

Mr. DRINAN. That would be in part abrogated according to what Congressman Cavanaugh said.

Mr. SMITH. With regard to financial records, that is correct.

Mr. DRINAN. Any other agency?

Mr. SMITH. IRS. The point is, I don't think that the use of that subpoena power leads to a criminal liability. That is the difference.

Mr. EDWARDS. Will the gentleman yield?

Mr. DRINAN. Yes.

Mr. EDWARDS. With those other procedures, is the subject notified in advance or at the same time? With the IRS and the SEC? I would think so.

Mr. SMITH. Under the Tax Reform Act, if the IRS seeks access to my records, yes, there is a notice provision in there. If the FDA were to issue a subpoena, an administrative subpoena, to come to my drug-store, I am not sure about the notice requirements. I believe there aren't any.

Mr. EDWARDS. But you are there.

Mr. DRINAN. That is done with your full knowledge, though. They come in to impound or seize drugs, so that is not behind your back.

Mr. SMITH. Conceivably they could impound the prescription records of customers, though those customers are not in jeopardy, unlike the FBI situation.

Mr. DRINAN. That is very interesting. No police force in the country ever had this power.

Mr. SMITH. Certainly not investigative demand. With regard to subpoena authority, I would be pleased to write to the subcommittee after I research that.

Mr. DRINAN. Tell us more about the banks. This was interesting about Citibank and Riggs. Is that the trend among the leading banks or is that the majority of banks or what?

Mr. SMITH. It's certainly the trend. The banks originally endorsed the Financial Right to Privacy Act. They pushed for it. They were litigants before the Supreme Court to limit access to financial records. The formal written request was not their idea. That once again put them in the middle, where they don't want to be.

By not complying with formal written requests, they take themselves out of the middleman position. I have no doubt that most banks—certainly I would imagine the American Bankers Association would counsel compliance only with a subpoena and not a formal written request.

Mr. DRINAN. Do you have any knowledge that the FBI is frustrated by the subpoena policy? What is their objection? They want it easier for themselves?

Mr. SMITH. I think they feel put upon because other executive branch agencies have this authority.

Mr. DRINAN. Have they ever been denied subpoenas?

Mr. SMITH. I don't know. I am sure they view it as a delay and paperwork requirement they could do without. I don't think they would have difficulty getting a subpoena.

Mr. DRINAN. I don't think so.

Mr. EDWARDS. If the gentleman will yield, Mr. Smith's answer was to your last question that yes, they feel frustrated because other

agencies have that power. Well, they have the power subject to going before a magistrate. In this particular investigative demand as designed in the charter, they don't have to go before a magistrate to get a delay. You get the delay in-house; so that is a big difference.

Mr. SMITH. A delay in notice; that is correct. There is precedent for an administrative agency having subpoena power without going outside of the agency. An administrative subpoena is that by definition.

Mr. EDWARDS. Talking about delay in advising the subject.

Mr. SMITH. That is unprecedented, yes.

Mr. DRINAN. On the factual information, Mr. Chairman, we would like to ask this—Tom, I would like this asked if I won't be here. This would permit the FBI to waive the notice requirement if notice to the customer would seriously jeopardize an investigation. What law enforcement officer would not seriously believe the notice requirement would seriously jeopardize an investigation? I would like to know how many times the FBI takes advantage of this exception. Maybe most of the time.

Mr. SMITH. That would be instructive to know.

Mr. DRINAN. One last question. Tell us more about the banks. This is very intriguing. They are resisting this procedure by which the FBI presents a little note to them.

Mr. SMITH. The banks don't view themselves as compilers of information for the Government. That is the point. They view themselves as having an obligation to their customers, not only one of confidentiality but one of compiling only enough information to process the account. They have always resisted Government demands for information unless the paperwork is secure and valid on its face.

So in view of the fact that the financial privacy bill makes it voluntary, discretionary, the banks, I think wisely, take advantage of that and insist that the Government investigator go back and get administrative subpoena or warrant.

Mr. DRINAN. Has this yet reached a policy decision by the American Bankers Association?

Mr. SMITH. I don't know. I can only say they didn't favor it when it became part of the legislation.

Mr. DRINAN. Any additional information on that would be helpful. Thank you very much.

I yield back the balance of my time.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. In noting the delay part of the financial institutions, under the charter if a bank refused to do it like they are doing now, what remedy does the Government have?

Mr. SMITH. The bank would be in violation of law. H.R. 5030 says the bank shall make the records available.

Mr. VOLKMER. Wait a minute, though. What criminal penalty is there if they don't?

Mr. SMITH. I am not sure whether there are criminal penalties for the bank. There are under the financial privacy bill. If a bank refuses to comply with an administrative subpoena or valid warrant, it subjects itself to criminal penalty. I presume the same is true in the FBI charter simply because the law says a custodian shall make the records available. That is section 533b(f)(7).

Mr. EDWARDS. If the gentleman will yield, this is a very important point to clear up at this time in the record. It's my understanding that

the bank can refuse to honor the investigative demand and there are no penalties.

Mr. VOLKMER. That is how I read this.

Mr. BOYD. That is correct.

Mr. VOLKMER. What it means is the FBI has to go to the judge.

Mr. EDWARDS. Mr. Boyd pointed out to me in a very useful fashion that a bank could use this as an advertising gimmick. We are your friendly, local bank that will resist investigative demands by the FBI.

Mr. VOLKMER. Don't worry about your records. As soon as we hear about it, get a lawful subpoena; we will notify you immediately.

Mr. SMITH. That is what Citibank is doing. I think it's a valid marketing technique. I certainly will go to the bank that honors my confidentiality more than the next one.

Mr. VOLKMER. That is the case under the charter. They would have to go to the judge.

Mr. SMITH. What does the language say, that the custodian "shall make the records available." That is different from what is in the financial privacy bill.

Mr. VOLKMER. I agree there is no enforcement except going to the judge. The other question I would like, the gentleman from Massachusetts brings out the other sensitive investigative techniques that the FBI may use in the course of a lawful investigation being conducted. Let's look at those a minute.

What is the present law on using a pen register?

Mr. SMITH. The Supreme Court said no warrant is required. It doesn't say it is a good technique.

Mr. VOLKMER. But it's not illegal. We don't—they could do it if we don't say anything. This is a limitation more than anything else.

Covert photographic surveillance—

Mr. SMITH. I am saying the Supreme Court decision is recent and it could change. If that provision were limited to applicable law, I would be pleased with it. It's possible the legal feeling about pen registers will change in the next year.

Mr. VOLKMER. Covert photographic surveillance.

Mr. SMITH. Some courts hold that telescopes and even binoculars require a warrant. Most don't.

Mr. VOLKMER. In most it doesn't. So the prevailing law in the country now is that it does not. The same with electronic location detectors. Prevailing law is that it is not.

Mr. SMITH. Yes.

Mr. VOLKMER. What I am saying is here to me this is more of a limitation than it is, even though you may object to it as policy, under the law this is more of a limitation than it is a granting of power.

Mr. SMITH. That is correct. It raises another point about the whole charter. The whole charter is written as a limitation. It doesn't say anything about what the FBI must do. We ought to have more emphasis on that.

Mr. VOLKMER. Basically, as far as the inquiry, would you be satisfied if instead of the FBI being able to issue, that all they do is request the U.S. attorney, in the local area where it's to be issued, to approve it?

Mr. SMITH. Yes.

Mr. VOLKMER. That would satisfy you.

Mr. SMITH. Yes; as the current situation is.

Mr. VOLKMER. On the delay, you prefer that a magistrate be the one to authorize the delay of notice.

Mr. SMITH. Yes.

Mr. VOLKMER. Would that be a magistrate within the jurisdiction where the notice is to be served?

Mr. SMITH. I presume, yes.

Mr. VOLKMER. Any magistrate.

Mr. SMITH. Yes.

Mr. VOLKMER. To be honest with you, you may have more feeling that they will protect the rights of people more than the Attorney general.

Mr. SMITH. No. I think it's in a separate branch of government, which is very important. There's documentation. It's something that the victim can get his teeth into if he is victimized and he may sue for damages.

Mr. VOLKMER. The other has to be in writing. We can make that a part that in the event there is—it has to be in writing, has to be specific as to why, et cetera.

Mr. SMITH. Under the Freedom of Information Act, you file a request to see that documentation and it's denied because it is an ongoing investigation. If the information is in the judicial branch, you might have an easier way of getting documentation that in fact this delay was issued. It could be that they would all be rubber-stamped, but the fact that it is a separate branch of government—

Mr. VOLKMER. Not necessarily all. Don't say that.

Thank you, Mr. Chairman.

Mr. EDWARDS. The IRS has summons authority for tax investigations, I believe; is that correct?

The subject has to be notified.

Mr. SMITH. Yes.

Mr. EDWARDS. The Justice Department has civil investigatory demand to investigate racketeering.

Mr. SMITH. Yes, under a special statute.

Mr. EDWARDS. Does the alleged suspect have the right to know that his or her records are being perused?

Mr. SMITH. The whole notion of notice is a rather new one. It's regarded as a citizen protection in view of the lessened privacy protection of an investigative demand or formal written request. Most subpoenas don't call for notice to the subject of the record.

Mr. EDWARDS. We will check that out.

Mr. Boyd?

Mr. BOYD. You indicated in your testimony and in response to Mr. Volkmer's questions that you object to certain types of sensitive investigative techniques as outlined in section 533(b)(8); is that correct?

Mr. SMITH. Yes.

Mr. BOYD. With regard to trash covers and consensual monitoring, to pick two, what is the basis for your objection?

Mr. SMITH. I think any inspection of trash ought to be based on probable cause. Not necessarily a warrant.

Mr. BOYD. Isn't the trash abandoned from the standpoint of legal definition?

Mr. SMITH. Some courts say so. Others say no. I would say trash in my yard, no.

Mr. BOYD. I don't think trash necessarily covers generally trash in your yard.

Mr. SMITH. FBI has gone into garbage on people's premises. There is documentation of that.

Mr. BOYD. Insofar as consensual monitoring is concerned, isn't a tape recording better evidence than someone's testimony at trial?

Mr. SMITH. The Supreme Court so held, yes. Consensual monitoring may include a whole host of things we are not currently aware of. If we are talking about the situation where an FBI agent is wired for sound to get better evidence, the Supreme Court clearly said that doesn't require a warrant.

Mr. BOYD. Thank you. No further questions.

Mr. EDWARDS. Counsel.

Ms. LEROY. You said in your written testimony that you don't think the Right to Financial Privacy Act is an adequate model in this case and you referred to the formal written request as one reason why you think that. Could you elaborate on your other reasons for thinking that that doesn't provide sufficient privacy safeguards.

Mr. SMITH. That is the main objection, that there is this certification of an informal seizure of information. The rest of the bill is adequate except for its complexity. I object to its complexity. Very much so. But the formal written request aspect of it is a new departure, I think, and it is totally out of the spirit of the whole law.

Ms. LEROY. Do you know why it was added?

Mr. SMITH. It's a compromise between the needs of law enforcement and privacy protection, I think. It is clear that if only subpoenas and warrants were adequate, then a lot of agencies would find their sources of information dry up.

The SEC was particularly adamant about that. They thought they couldn't conduct any investigations at all if in fact they had to go through the legal paperwork, even though they have already the subpoena authority. I think there were enough exceptions in the law with regard to emergencies and destruction of evidence and the rest that would take care of their problems but they didn't see it that way.

Ms. LEROY. Also in your statement you said something about the fact that past lack of outside, dispassionate oversight was part of the problem that led to FBI abuses of its power. Do you think that at least in this provision under the charter that kind of outside, dispassionate oversight is provided?

Mr. SMITH. No.

Ms. LEROY. What would you add?

Mr. SMITH. Certainly to have the waiver of the notice requirement done only by outside magistrate or authority, that would be one thing. In seeking information under search warrant or subpoena, the government does have to get the sanction of the judicial branch. That is not true under investigative demand.

If you delete the investigative demand, then you restore that outside oversight.

Ms. LEROY. What about civil remedies or penalties for violations of the provisions of the charter? I understand the Financial Privacy Act has some penalties in it for violations of its terms. Would you add similar provisions in this part of the charter, or to the whole charter for that matter?

Mr. SMITH. I would, but I think criminal sanctions are not the most effective for abuses. They are so rarely invoked. I think that really stiff disciplinary sanctions are much more effective as well as others that affect the Bureau as a bureaucracy rather than the individual.

Perhaps, if there were abuses the FBI would lose its power to do certain things. That would affect the bureaucracy and might be much more effective.

Ms. LEROY. Actually I was talking more about civil remedies for violations if records were turned over or disseminated improperly. than the subject would have a damage suit or whatever.

Mr. SMITH. I think that is very important, either against the custodian or against the FBI. This charter proposal involves an immunity to the custodian.

Ms. LEROY. That was the next part of my question. What would you suggest in lieu of immunizing the custodian from all responsibility, which I think the charter does?

Mr. SMITH. It does. I would endorse no immunity at all. The record custodian should be responsible for what he or she releases.

Ms. LEROY. Is there a provision like that in the Right to Financial Privacy Act?

Mr. SMITH. Yes; there is an immunity. I would read it as relieving the financial institution of responsibility if it complies with a compulsory process. I think that there may be some doubt as to whether the institution is immunized when it complies with a formal written request.

Ms. LEROY. That is all. I don't have any more questions.

Mr. EDWARDS. Thank you.

Now the charter contains no provision which bars informal access to records so if an agent or an informant has access to records by consent of the custodian, there are no penalties attached to the violation of privacy by the custodian.

Mr. SMITH. Except for a civil lawsuit, that is correct. A State statute could be violated.

Mr. EDWARDS. So there would be, you think, under almost any State or Federal law, there would be a violation of the right of privacy and that would be actionable now.

Mr. SMITH. It depends on the type of information that is disclosed. If it's extremely sensitive, especially if there is a recognized privilege between the subject of the information and the custodian, like a doctor's privilege, then I think you would have a strong civil lawsuit, yes.

Mr. EDWARDS. Do you think it should be against the law for an investigative police officer to go to a bank and ask for private information?

Mr. SMITH. I think to get verbal information ought to be permissible. To get documentary evidence ought to be limited by subpoena or a warrant. The protection for the individual is the liability that the custodian has.

Mr. EDWARDS. Is there a body of law being developed now whereby these custodians are being held liable for the release of information in an authorized fashion?

Mr. SMITH. Yes; in Michigan, for example, an employer who releases personnel records would violate a State law. In about a half

dozen States a health institution or doctor would be liable. That is strictly under State law as opposed to the privilege.

In nine States if the Bureau were to get information out of State government, that might violate State law. There is a trend in that direction, yes.

Mr. EDWARDS. Your testimony didn't include to any extent, as I recall, the transfer of information from one government agency to another.

Mr. SMITH. I didn't focus on that. My colleagues tell me this sort of scheme makes the FBI a funnel for all sorts of third-party information to go throughout the whole Government. In fact, Mr. McKinney's testimony substantiated that. I don't have any evidence of that so I didn't concentrate on that aspect. I don't see that as key.

I know the Financial Privacy Act does limit dissemination of information within the Federal Government but I don't find that is as crucial as the gathering of information in the first place.

Mr. EDWARDS. Tell us about the Privacy Journal and your organization.

Mr. SMITH. You are looking at it. It's an individual. I publish Privacy Journal and have for the last 5 years. It's an independent newsletter that reports on anything having to do with confidentiality of information and the impact of technology on people's rights.

Mr. EDWARDS. You have subscribers?

Mr. SMITH. That's correct. It's supported solely by subscribers.

Mr. EDWARDS. Have you gotten into the NCIC and criminal histories of message switching and that debate that has been going on with regard to the FBI handling of the NCIC and criminal records and the transfer from place to place of criminal records?

Mr. SMITH. I have, yes. I covered that for 6 years.

Mr. EDWARDS. We will need more help from you. The subcommittee is very interested in that.

Mr. SMITH. I appreciate your leadership on this, too. Your experience really gives the subcommittee credibility.

Mr. EDWARDS. Are there further questions?

Ms. LEROY. I have one. In their testimony in the Senate Judiciary Committee, the Department of Justice and the FBI characterized the records that are covered in the investigative demand provision—not the financial records but the insurance company and the credit records and the telephone toll records—as less sensitive than those records covered by the Right to Financial Privacy Act and therefore I believe their conclusion was entitled to fewer safeguards.

Would you comment on that statement?

Mr. SMITH. It's a subjective judgment anyway. Some people feel more strongly about their financial than their health records. What the FBI wants access to are my health records held by my insurance company, all the claims that I submit, doctors that I consult, the ailments I had including those of my family. All of that information is on file at the insurance company.

I would say that is more sensitive than what is in my checking account. In terms of my values, and I think a lot of other person's values.

In addition to that, the insurance company and the credit institution would have on file hearsay from my neighbors and coworkers. In many cases that is much more sensitive than bank records because

it involves drinking habits and driving habits and smoking habits and the way one rears his or her children, that sort of gossip finds its way into those files.

The larger danger with those files is they are not very accurate. I would say that what is on file for me in my insurance company and the consumer reporting agency and the credit bureau and the telephone company is much more sensitive than what is on file at my bank.

Ms. LERoy. Why do you distinguish between written records and information that is transmitted verbally, which may have the same content and in fact may even be less reliable in terms of the standards that you would apply for obtaining that information?

Mr. SMITH. Verbal information isn't as credible as the written record and therefore I think can do less harm. I also think law enforcement needs a starting point somewhere. They can't go and get a subpoena if they have only the most spurious lead. They have to interview and find a direction for their investigation. What worried me about the FBI files I have seen and that people send me under the Freedom of Information Act and Privacy Act is that spurious documents are attached to the file, including newspaper clippings, that are taken out of context, and because it's written down, FBI agents think it's very credible and that it is true.

If you had a written narrative of an interview by an FBI agent, you give that the credibility it deserves. That is simply raw data; but a document looks more credible.

In addition to that, a document, like a dragnet, brings in a lot of extraneous information. There is a large difference between the FBI going to my bank and saying, "Did he make a withdrawal on such and such a date?," getting that information; and getting a whole print-out of my transactions for the last 5 years. There is a world of difference there. A difference of relevance.

Interviewing, verbal communications, almost by definition is a check against irrelevance.

Ms. LERoy. Thank you. I don't have any more questions.

Mr. EDWARDS. Our compliments to you, Mr. Smith, for your excellent testimony and indeed for the work you do with your organization.

Without objection, the full testimony of Mr. Smith will be made part of the record. We stand adjourned.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]



# LEGISLATIVE CHARTER FOR THE FBI

FRIDAY, OCTOBER 19, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, Volkmer, and Sensenbrenner.

Staff present: Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning we are going to conclude our examination and public hearings of the investigative command provision of H.R. 5030, the proposed legislative charter for the FBI. Our first witness is Ronald L. Plesser. Mr. Plesser was the general counsel of the Privacy Protection Study Commission. The commission devoted a great deal of attention to the issue of access to third-party records, so Mr. Plesser comes to us with considerable expertise in this area.

We welcome you. You may proceed.

## TESTIMONY OF RONALD L. PLESSER, ATTORNEY AT LAW, BLUM AND NASH, WASHINGTON, D.C.

Mr. PLESSER. I would like to submit my full statement for the record.

Mr. EDWARDS. Without objection, it will be made a part of the record in full, and you may proceed.

[The information follows:]

### TESTIMONY OF RONALD L. PLESSER

Mr. Chairman, and members of the Subcommittee on Civil and Constitution Rights, my name is Ronald L. Plesser and it is my pleasure to be here this morning. I have been asked to discuss with you the Access to Third Party Records Section (Section 533b(f)) of H.R. 5030—The FBI Charter. It was my honor to have served as General Counsel to the U.S. Privacy Protection Study Commission and to have been a consultant to the Presidential Initiative on privacy from November 1977 through August 1978. I am currently a partner with the firm of Blum & Nash in Washington, D.C. I have spent much time over the past years studying the issue of government access to third party records and it is my hope that my testimony this morning will be of help to this Committee in the very difficult and important task of developing a statutory charter for the FBI.

My testimony will focus on what I have identified as the three major effects of the Civil Investigative Demand provision of the proposed Charter. First, it may result in the creation of a government access policy different for every agency in government. Consequently, an individual's rights will vary from record system to record system and from agency to agency with no uniform policy, as called for by the Privacy Commission. Second, as currently drafted the privacy protection portions of the FBI Charter will result in standards below those adopted in the Financial Privacy Act of 1978 and well below those recommended by the Privacy Commission. The Financial Privacy Act, at the very minimum should be the base line of privacy standard in the FBI Charter and other privacy-type legislation. Finally, the enactment of the government access provision will result in giving the FBI, for the first time, general authority to compel the disclosure of certain documents though the use of civil process prior to the initiation of litigation or grand jury consideration without any concomitant limitation on the use or dissemination of such information once obtained. Such use and dissemination restrictions are the hallmark of other statutes which provide agencies with civil investigatory demand authority and should be extended to the FBI if they are given mandatory subpoena authority.

It is important to explain why government access to records has become such a significant issue. In 1976, in a sweeping decision, *Miller v. U.S.*, the U.S. Supreme Court held that the government may not be challenged when it sought access to bank records through the use of a grand jury subpoena.

The court reasoned that when an individual wrote a check, he entered into the flow of commerce and lost any interest he might have had in objecting to government access to such record.

In that landmark case, the Bureau of Alcohol, Tobacco and Firearms used a grand jury subpoena to obtain bank records of a man suspected of operating an illegal distillery. But the subpoena was apparently not, in fact, issued by a grand jury and was not returnable when a grand jury was sitting.

When finally prosecuted; the defendant attempted to suppress use of the information obtained because of procedural irregularities. But the Supreme Court held that Mr. Miller had no standing to raise those objections because the records belonged to the bank and not to him.

The ruling contained an important statement concerning the right of individuals to control records maintained about them. Not only did an individual not have any interest to assert in connection with government access, but the individual henceforth could not restrict (even subject to agreement) how the bank otherwise used or treated this information.

An institution seeking to protect interests of its customers, when served with a subpoena similar to that in *Miller*, could raise only the most facial objections to the government inquiry; in any event, the Fourth and Fifth Amendment concerns of the customer could not be asserted by the banks. There was therefore little, if anything, that an individual could do to limit or control what the government collects. This result has not been lost on the general public. The recent Lou Harris Survey completed for Sentry Insurance Company states that "overwhelming majorities . . . the public . . . feel that a law enforcement agency should not be able to open the mail, tape the telephones, or look at the bank record of individuals without a court order." In reaction, at least in part, to the *Miller* decision, the U.S. Privacy Protection Study Commission in its July 1977 report to the President and Congress, believed that a critical aspect of a national privacy policy was "to create and define obligations with respect to the uses and disclosures that will be made of recorded information about an individual" or in other words "to create legitimate, enforceable expectations of confidentiality."

This creation of an expectation of confidentiality is clearly a double creation. First, it requires that certain third party record keepers, such as financial institutions, medical record keepers, insurance institutions, inform individuals about whom they maintain records of the disclosures of records that are to be made and to limit actual disclosure to such notifications. It would effectively bar the voluntary disclosure of records to governmental agencies unless the government had complied with its own privacy statutes. Second, it requires the creation of controls in the manner in which government can collect information.

It is in this second prong of the expectation of confidentiality concept that has seen recent legislative action in the form of the Financial Privacy Act of 1978, 12 U.S.C. § 3041 et seq., and which is the basis of the proposed legislation we are discussing this morning. In connection with the first prong of an expectation of confidentiality, the White House with the assistance of the National Telecommunications and Information Administration has presented to the Congress

legislation aimed at the insurance, credit and banking industry which establishes standards for the confidentiality of the records, the hand of the record keeping institutions. They have already introduced legislation concerning the confidentiality of medical records. The Presidential Initiative, I understand, will be sending to Congress within the next year legislation which will regulate general government access to credit insurance records and similar records.

My first observation in reviewing government access provisions of the proposed FBI Charter is: why are privacy protection controls being considered here in the exclusive context of the FBI? The citizens of this country and indeed the record keeping institutions who have to respond to government's requests should have the benefit of uniformity. The level of privacy protection available to a citizen should not depend upon the identity of the bureaucratic organization making the request. The effect of the Charter would put FBI privacy-related practices at a much different level than that applicable even to other federal agencies.

The IRS is under one set of controls pursuant to the Tax Reform Act of 1976, 26 U.S.C. § 6103, drug abuse agencies are under another set of controls, Drug Abuse Prevention and Treatment Act, 21 U.S.C. §§ 1102-1191. Of greater importance, is that under the terms of the Financial Privacy Act of 1978, 12 U.S.C. § 3402, enacted on the basis of the recommendations of the Privacy Commission, bank records obtained by government agencies are under still different standards. The Financial Privacy Act relates to a relatively limited range of documents maintained by banks, credit card grantors and similar financial institutions. However, it is very broad in that it applies to all federal agencies including the FBI. (The SEC alone was exempted for a two-year period following its adoption.) The proposed Charter relates to a different set of records. The controls on access and the rights of an individual to challenge "administrative subpoena" or "investigative demand" are quite different between the proposed Charter and the Financial Privacy Act.

The result of the enactment of the FBI Charter as drafted will be to create a hodge podge of differing levels of protection. I believe that the better result would be the creation of a rationalized national policy of privacy protection for government access to personal information maintained by third party record keepers. I urge this Committee to consider the proposals coming from the Presidential Initiative and to work towards the development of such a national policy.

Having made that point it is important to understand the Financial Privacy Act of 1978 and the difference between it and the proposed FBI Charter.

The Right to Financial Privacy Act of 1978 relates to records held by a financial institution (bank, savings and loan, credit card issuer, and the like) pertaining to a customer's relationship with that financial institution. The Act basically provides that a federal investigator must use some form of legal process or formal written request in order to obtain bank records, e.g., checking account, loan file, credit card record.

The Privacy Commission's original recommendation was that government agencies must use compulsory process every time they seek records about an individual. This was seen by Congress as overly restrictive, because many agencies such as the Department of Justice and the FBI did not have administrative subpoena authority and the only process available to them would be a Grand Jury subpoena or search warrant.

Given the unavailability in some instance of grand juries and the high standard of probable cause generally necessary in order to obtain a search warrant, a need was seen for a new procedure by which investigators could obtain access to records. Therefore, the Act creates a new type of procedure called "formal written request" which allows agencies in instances where administrative process "does not reasonably appear to be available" to obtain such access by use of formal written request.

Such a "formal written request" must be issued pursuant to regulations set by the agency and is by definition not compulsory. Unlike an administrative subpoena, the bank or credit card company does not have to respond. Therefore if a customer has instructed a bank not to turn over records, the bank could simply refuse to do so if presented only with a formal written request.

As a general rule, a government agency must notify the individual that a request has been made for the individual's record and that within 10 days of the date of service or 14 days from the date of mailing the bank customer may file a sworn statement in a U.S. District Court accompanied by a motion to quash.

As a primary matter, an agency does not have to give notice of a request under two circumstances.

First, where the individual is not the subject of investigation, but the institution is being examined or investigated. Second, Grand Jury subpoenas, secret service

and authorized foreign counter- or foreign positive- intelligence functions or investigation are exempted. There is no customer notice and challenge rights where a government agency is involved in one of these three activities.

Emergency access, requiring notice only after the documents have been obtained is available where the government can show that delay in obtaining access would result in one of the following:

- Physical injury to any person;
- Serious property damage; or
- Flight to avoid prosecution.

In those emergency cases notice must be given within five days of the access.

In addition, customer notice can be delayed for multiple periods of up to 90 days, if the agency can convince a U.S. District Court Magistrate or Judge that notice would result in:

- Endangering the life or physical safety of any person;
- Flight from prosecution;
- Destruction of or tampering with evidence;
- Intimidation of potential witnesses; or
- Otherwise seriously jeopardizing an investigation or official proceedings or unduly

delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

A bank or other institution is to be assured by the agency seeking access that the agency has complied with the notice or waiver of notice requirements. Once the bank receives written assurance that the agency has complied with the terms of the Act it may, or in cases of compulsory process it must, turn over the requested records.

A bank is prohibited from disclosing requested records to government agents unless it has received written assurance of government compliance, and then it may be held harmless for any irregularity that may have occurred.

The heart of the statute is the customer's challenge provisions, which not only gives the customer the right to seek a motion to quash, but establishes the standard that the government must satisfy in obtaining access to bank records. The government must establish that the terms of the Act have been complied with and that there is "demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry".

The customer must initiate the motion to quash and has the initial burden of convincing a U.S. District Court Judge or Magistrate that the information is not relevant to a legitimate law enforcement inquiry or that the government has not been in substantial compliance with the provisions of the Act.

Finally, if the customer meets this burden, then the judge shall order the government to respond and affirmatively show that the records sought are relevant for law enforcement purposes. The government may submit its response in camera "if appropriate". The judge or magistrate seemingly is the sole judge of whether in camera inspection is or is not appropriate.

The customer challenge provision creates a unique judicial procedure in that the government does not have to respond until the court is convinced by the customer that the Act has not been complied with.

This approach differs significantly from the approach taken in Section 1205(a) of the Tax Reform Act of 1976, which requires that where a customer objects, the IRS must seek enforcement of the requested process against the bank with the individual being given the right to intervene in the enforcement action. 26 U.S.C. Section 7609. Only experience will tell which is a more effective approach.

The burden on the record holder—a bank or credit card company, in the case of this legislation—is minimal. The bank has to generally inform all of its customers of the provisions of the Right to Financial Privacy Act of 1978 and is prohibited from disclosing records to federal government officials unless it has been certified to them that the government officials have complied with the Act.

The proposed Charter provisions provide for access to a different group of records. The provision encompasses access to toll records from a communications common carrier, insurance record and records from a credit institution not otherwise encompassed by the Right to Financial Privacy Act of 1978. As will be discussed later, the charter does propose to amend the Financial Privacy Act by allowing the FBI compulsory access to records subject to that Act, where the original Act only allowed them to request bank and credit card records subject to the voluntary response of the institution holding the records.

The differences in privacy protection between the Financial Privacy Act and the proposed FBI Charter are readily apparent, but I would like to highlight some of the more critical differences.

First, delay in notification to the customer in the Financial Privacy Act can be accomplished in most cases only with the consent of a U.S. District Judge or Magistrate. In the FBI Charter, delay can be accomplished simply upon the unreviewable certification of the Attorney General. The central purpose of the creation of expectation of confidentiality is to know about and to challenge access to records. The unreviewable judgment of the Attorney General is simply not sufficient to assure that the individual's rights will be protected. There simply is no check built into the system. The step of requiring the government to go to court to seek waivers of notice is an important check in assuring strict compliance with the proposed standards.

Second, there is a major difference in the burden on the individual. If the individual has received notice, then the individual has the complete burden to prove that the demand is not relevant to a lawful investigation or that there are other legal bases for objecting to the release. Since the investigative demand is, by definition, issued prior to the institution of a formal proceeding, the individual is probably the last person to know the relevance of a document request since it is quite possible that the individual may not know what the government is investigating in the first place.

The Financial Privacy Act while not completely resolving the problem goes a lot further by at least requiring the government to make a showing that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and that there is a reasonable belief that the records sought are relevant to that inquiry. The individual may have to go first, but ultimately the government has to satisfy that standard.

That is not the case here. In the Charter, if individuals cannot affirmatively prove that the records are not relevant, they lose their case. As a practicing attorney I can conservatively state that under the circumstances such a burden is an impossible one. In other words, what is proposed here is a right without a remedy. An individual can go into court, but once there the individual has an almost impossible standard to meet.

Third, the Charter unlike the Financial Privacy Act seems not to contemplate the appealability of the motion to quash. The ability to seek appeal is of crucial importance. The Financial Privacy Act provides for appeal as long as the appeal would not be interlocutory. The same consideration should be implemented in the Charter.

Finally, the difference between the two is made clear by the lack of detail of the proposed FBI Charter Civil Investigative Demand section in comparison to the Financial Privacy Act. That Act defines the notices to be sent to individuals, it defines the responsibilities of the record keeper and the obligations of the government agency. The proposed Charter is devoid of these details. This is one example where less is not better. The area of privacy protection is new and developing and I believe it deserves more rather than less legislative guidance.

Consequently, it is my belief that the standards of privacy protection are considerably lower in the Charter and at a minimum this Committee should endeavor to raise the standards of privacy protection in the proposed Charter to the level of the Financial Privacy Act.

My final general concern with the Charter is the issue of compulsory process and limitation on redisclosure. Other agencies have administrative compulsory process or investigatory demand authority. Consequently, the FBI is seeking its own compulsory process for records subject to the Charter and those other records already subject to the Financial Privacy Act. There are two basic differences, however, between other examples of pre-litigation or pre-Grand Jury compulsory process and the Charter.

First, in most cases the compulsory process of civil investigative demand are given in connection with specific types of enforcement actions. For example, the SEC has summons authority for security investigation, the IRS has summons authority for tax investigation and the Antitrust Division has civil investigatory demand authority for antitrust violation and the Justice Department itself has civil investigatory demand authority under the organized Crime Act to investigate racketeering.

The difference is that the FBI has the authority to investigate all crimes under Title 18. If the FBI needs expanded document gathering authority because of its increasing involvement in white collar crimes, it would seem more appropriate to consider compulsory process in connection with specific type crimes. For example, the Senate Governmental Affairs Committee is currently considering legislation concerning computer crime. Computer crime according to Director Webster in his recent speech in Detroit to the American Society for Industrial Security is one of the new top priorities of the FBI. If some sort of compulsory process is needed

by the FBI in connection with the difficult task of enforcing a computer crime statute, then it would seem to be better policy to justify the need for mandatory authority in the particular circumstances of a computer crime bill. The Congress could then ascertain the specific reasons to justify the extension to compulsory process. In the current context since the entire Criminal Code is affected, there simply is little to specifically justify the extension of compulsory authority which will greatly expand the types of records about citizens that will be obtainable.

A final concern is raised by looking at the civil investigative demand authority available to the antitrust division and to the Justice Department in connection with racketeering. Both provide for very broad authority. However, there are two significant differences. An antitrust CID is directed at the subject of the investigation and not to a third party record keeper. That in itself protects against dangers of secret data collection.

However, of more significance is the very stringent restriction that documents obtained through the use of an antitrust CID or a section 1968, Racketeering CID, cannot be disseminated to other agencies or for other purposes even within the Department of Justice which do not relate to enforcement of antitrust laws or organized crime respectively.

The proposed FBI Charter explicitly provides that subjects to guidelines established by the Attorney General and consistent with the Privacy Act and the Freedom of Information Act information obtained pursuant to the investigative demand portion of the Charter may be disseminated to state and local criminal justice agencies. Since the FBI would be able to use its investigative demand authority for any crime there could be tendency for the FBI to become the general collection agency for federal and state law enforcement in this country. Personal privacy concerns in connection with the creation of compulsory process are multiplied by the affirmative encouragement for dissemination in the Charter. The Privacy Act, 5 U.S.C. § 552a, as a result of its broad routine use provision effectively puts no limit on the dissemination of information among law enforcement authorities. The danger is the creation of the FBI as the central record collection agency for government enforcement. At present, I can see no justification for such a wide ranging result.

It is my belief that if compulsory process authority is provided in the FBI Charter, then as is the case with the antitrust CID and the Organized Crime Act there should be a strong limit on redissemination.

I support the activity of this Committee in developing a Charter for the FBI and I urge you to consider the privacy protection standards in the context of a developing national privacy policy. Thank you for your interest.

Mr. PLESSER. Mr. Chairman and members of the Subcommittee on Civil and Constitutional Rights, my name is Ronald L. Plessner and it is my pleasure to be here this morning. I have been asked to discuss with you the access to third party records section—section 533b(f) of H.R. 5030—the FBI Charter. It was my honor to have served as general counsel to the U.S. Privacy Protection Study Commission and to have been a consultant to the Presidential initiative on privacy from November 1977 through August 1978. I am currently a partner with the firm Blum & Nash in Washington, D.C.

It is important to explain first why government access to records has become such a significant issue. In 1976, in a sweeping decision entitled *Miller v. U.S.* the U.S. Supreme Court held that the Government may not be challenged when it sought access to bank records through the use of a grand jury subpoena. That is it may not be challenged by the individual about whom the record relates.

The court reasoned that when an individual wrote a check, he entered into the flow of commerce and lost any interest he might have had in objecting to Government access to such record.

In reaction, at least in part, to the Miller decision, the U.S. Privacy Protection Study Commission in its July 1977 report to the President and Congress, believed that a critical aspect of a national privacy policy was "to create and define obligations with respect to the uses and disclosures that will be made of recorded information about an

individual" or in other words "to create legitimate, enforceable expectations of confidentiality."

This creation of an expectation of confidentiality is clearly a double creation.

First: It requires that certain third-party recordkeepers, such as financial institutions, medical recordkeepers and insurance institutions, inform individuals about who they maintain records of the disclosures of records that are to be made and to limit actual disclosure to such notifications. It would effectively bar the voluntary disclosure of records to governmental agencies unless the Government had complied with its own privacy statutes.

Second: It requires the creation of controls in the manner in which government can collect information.

It is in this second prong of the expectation of confidentiality concept that has seen recent legislative action in the form of the Financial Privacy Act of 1978, 12 U.S.C. section 3041 et seq., and which is the basis of the proposed legislation we are discussing this morning. In connection with the first prong of an expectation of confidentiality, the White House with the assistance of the National Telecommunications and Information Administration has presented to the Congress legislation aimed at the insurance, credit and banking industry which establishes standards for the confidentiality of the records, in the hand of third-party recordkeeping institutions.

They have already introduced legislation concerning the confidentiality of medical records. The Presidential initiative, I understand, will send to Congress within the next year legislation which will regulate general government access to credit insurance records and similar records.

My first observation in reviewing Government access provisions of the proposed FBI Charter is "why are privacy protection controls being considered here in the exclusive context of the FBI?" The citizens of this country and indeed the recordkeeping institutions who have to respond to Government's request should have the benefit of uniformity. The level of privacy protection available to a citizen should not depend upon the identity of the bureaucratic organization making the request. The effect of the charter would put FBI privacy-related practices at a much different level than that applicable even to other Federal agencies.

The proposed charter provisions provide for access to a different group of records than the Financial Privacy Act of 1978. The provisions encompasses access to toll records from a communications common carrier insurance record and records from a credit institution not otherwise encompassed by the Right to Financial Privacy Act of 1978. As will be discussed later, the charter does propose to amend the Financial Privacy Act by allowing the FBI compulsory access to records subject to the act, where the original act only allowed them to request bank and credit card records subject to the voluntary response of the institution holding the records.

The differences in privacy protection between the Financial Privacy Act and the proposed FBI Charter are readily apparent, but I would like to highlight some of the more critical differences.

First: Delay in notification to the customer in the Financial Privacy Act can be accomplished in most cases only with the consent of a U.S. district judge or magistrate. In the FBI Charter, delay can be accomplished simply upon the unreviewable certification of the Attorney

General. The central purpose of the creation of expectation of confidentiality is to allow the individual to know about and to challenge government access to records. The unreviewable judgment of the Attorney General is simply not sufficient to assure that the individual's rights will be protected. There is no check built into the system. The step of requiring the Government to go to court to seek waivers of notice is an important check in assuring strict compliance with the proposed standards.

Second: There is a major difference in the burden on the individual. If the individual has received notice, then the individual has the complete burden to prove that the demand is not relevant to a lawful investigation or that there are other legal bases for objecting to the release. Since the investigative demand is, by definition, issued prior to the institution of a formal proceeding, the individual is probably the last person to know the relevance of a document request since it is quite possible that the individual may not know why the Government is investigating him in the first place.

I might say that I also think it raises some fifth amendment questions, because before the investigation or the charges have been issued in effect a client has to come in and say why it is not relevant, and in doing so, he has to make a statement about guilt or innocence. As a lawyer it would be very difficult for me to advise the client what to say in those types of proceedings, given concerns of the fifth amendment.

The Financial Privacy Act while not completely resolving the problem goes a lot further by at least requiring the Government to make a showing that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and that there is a reasonable belief that the records sought are relevant to that inquiry. The individual may have to go first under the Financial Privacy Act, but ultimately the Government has to satisfy that standard.

That is not the case here. In the charter, if individuals cannot affirmatively prove that the records are not relevant, they lose their case. As a practicing attorney I can conservatively state that under the circumstances such a burden is practically impossible. In other words, what is proposed here is a right without a remedy. An individual can go into court, but once there the individual has an almost impossible standard to meet.

Third: The charter unlike the Financial Privacy Act seems not to contemplate the appealability of the motion to quash. The ability to seek appeal is of crucial importance. The Financial Privacy Act provides for appeal as long as the appeal would not be interlocutory. The same consideration should be implemented in the charter.

Finally, the difference between the two is made clear by the lack of detail of the proposed FBI Charter civil investigative demand section in comparison to the Financial Privacy Act. The act defines the notices to be sent to individuals, it defines the responsibilities of the recordkeeper and the obligations of the Government agency. The proposed charter is devoid of those details. This is one example where less is not better. The area of privacy protection is new and developing and I believe it deserves more rather than less legislative guidance.

Consequently, it is my belief that the standards of privacy protection are considerably lower in the charter and at a minimum this committee should endeavor to raise the standards of privacy protection in the proposed charter to the level of the Financial Privacy Act.

My final general concern with the charter is the issue of compulsory process and limitation on redisclosure. Other agencies have administrative compulsory process or investigatory demand authority. Consequently, the FBI is seeking its own compulsory process for records subject to the charter and those other records already subject to the Financial Privacy Act. There are two basic differences, however, between other examples of pre-litigation or pre-grand-jury compulsory process and the charter.

First, in most cases the compulsory process of civil investigative demand are given in connection with specific types of enforcement actions. For example, the SEC has summons authority for security investigation, the IRS has summons authority for tax investigation, and the Antitrust Division has civil investigatory demand authority for antitrust violation and the Justice Department itself has civil investigatory demand authority under the Organized Crime Act in investigate racketeering.

The difference is that the FBI has the authority to investigate all crimes under title 18. If the FBI needs expanded document-gathering authority because of its increasing involvement in white-collar crimes, it would seem more appropriate to consider compulsory process in connection with specific type crime. For example, the Senate Governmental Affairs Committee is currently considering legislation concerning computer crime, and the House is considering it as well, of course.

Computer crime according to Director Webster in his recent speech in Detroit to the American Society for Industrial Security is one of the new top priorities of the FBI. If some sort of compulsory process is needed by the FBI in connection with the difficult task of enforcing a computer crime statute, then it would seem to be better policy to justify the need for mandatory authority in the particular circumstances of a computer crime bill. The Congress could then ascertain the specific reasons to justify the extension to compulsory process. In the current context since the entire criminal code is affected, there simply is little to specifically justify the extension of compulsory authority which will greatly expand the types of records about citizens that will be obtainable.

A final concern is raised by looking at the civil investigative demand authority available to the Antitrust Division and to the Justice Department in connection with racketeering. Both provide for very broad authority. However, there are two significant differences. An antitrust CID is directed at the subject of the investigation and not to a third party recordkeeper. That in itself protects against dangers of secret data collection.

However, of more significance is the very stringent restriction that documents obtained through the use of an antitrust CID or a section 1968, Racketeering CID, cannot be disseminated to other agencies or for other purposes even within the Department of Justice which do not relate to enforcement of antitrust trust laws or organized crime respectively.

The proposed FBI Charter explicitly provides that subject to guidelines established by the Attorney General and consistent with the Privacy Act and the Freedom of Information Act information obtained pursuant to the investigative demand portion of the charter may be disseminated to State and local criminal justice agencies. Since the FBI would be able to use its investigative demand authority

for any crime, there could be tendency for the FBI to become the general collecting agency for Federal and State law enforcement in this country.

Personal privacy concerns in connection with the creation of compulsory process are multiplied by the affirmative encouragement for dissemination in the charter. The Privacy Act, 5 U.S.C., section 552a, as a result of this broad routine use provision effectively puts no limit on the dissemination of information among law enforcement authorities. The danger is the creation of the FBI as the central record collection agency for government enforcement. At present, I can see no justification for such a wide-ranging result.

It is my belief that if compulsory process authority is provided in the FBI Charter, then as is the case with the antitrust COD and the Organized Crime Act there should be a strong limit on redissemination.

I support the activity of this committee in developing a charter for the FBI and I urge you to consider the privacy protection standards in the context of a developing national private policy. Thank you for your interest.

I have two things that I would like to introduce into the record that I think will be helpful to the committee. Exhibit A are the routine uses of the FBI under the Privacy Act that are currently in effect, and exhibit B are the routine use provisions that the FBI has proposed for one of its systems of records. I submit those for the record.

MR. EDWARDS. Without objection, they will be made a part of the record.

[The information follows:]

#### EXHIBIT A—REGULATION NOW IN EFFECT

[From the Federal Register, Sept. 28, 1978]

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: The records contained in this system are utilized by the FBI in support of its mission to conduct investigations within its jurisdiction and for various administrative purposes. Information from these files is disseminated to appropriate Federal, State, local, and foreign agencies where the right and need to have access to this information exists—for example, to assist in the general crime prevention and detection efforts of the recipient agency. Information is also disseminated to these agencies and to individuals and organizations, where such dissemination is necessary to elicit information from such agencies and individuals. Information from this system is also disseminated during appropriate legal proceedings. For example, witness interviews are made available to defendants pursuant to the Jencks Act during Federal criminal trials. In the event that a system of records maintained by this agency to carry out its functions indicated a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, State, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto. A record from this system of records may be disclosed as a "routine use" to a Federal, State or local agency maintaining civil, criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit. A record from this system of records may be disclosed to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the

matter. For example, in discharging its obligations under Executive Order 10450, this agency would disseminate record information as a direct result of a name check request submitted by another government agency. A record relating to an actual or potential civil or criminal violation of title 17, United States Code, may be disseminated to a person injured by such violation to assist him/her in the institution or maintenance of a suit brought under such title. Background and descriptive information on Federal fugitives is disseminated to the general public and the news media in an effort to bring about apprehension of these wanted individuals. News releases are also disseminated to the public and the news media concerning apprehensions of FBI fugitives and other notable accomplishments. Additionally, public source information is distributed on a continuing basis, upon request, to the general public and representatives of the media. Upon specific approval of the Director, information may be disseminated from this system to individuals in the private sector in extenuating circumstances in order to protect life or property. Information which relates to foreign counter-intelligence matters may be disseminated to individuals in the private sector with the specific authority of the Attorney General where he deems it necessary in order for the Federal Bureau of Investigation (FBI) to fulfill its statutory responsibilities to investigate espionage in the United States. The FBI has received inquiries from private citizens and Congressional offices in behalf of constituents seeking assistance in locating such individuals as missing children or heirs to estates. Where the need is acute and where it appears FBI files may be the only lead in locating the individual, consideration will be given to furnishing relevant information to the inquiring individual. Information will be provided only in those instances where it can be determined from the information at hand that the individual being sought would want the information to be furnished, e.g. an heir to a large estate. Information with regard to missing children will not be provided where they have reached their majority. The decision to make any dissemination under these circumstances can be made only by the Director, and this authority cannot be delegated.

**Release of information to the news media:** Information permitted to be released to the news media and the public pursuant to 28 CFR 50.2 may be made available from systems of records maintained by the Department of Justice unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**Release of information to Members of Congress.** Information contained in systems of records maintained by the Department of Justice, not otherwise required to be released pursuant to 5 U.S.C. 552, may be made available to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of and at the request of the individual who is the subject of the record.

**Release of information to the National Archives and Records Service:** A record from a system of records may be disclosed as a routine use to the National Archives and Records Service (NARS) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

## EXHIBIT B—PROPOSED REGULATION

[From the Federal Register, Oct. 12, 1979]

### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES

Records, both investigative and administrative, are maintained in this system in order to permit the FBI to function efficiently as an authorized, responsive component of the Department of Justice. Therefore, information in this system is disclosed to officials and employees of the Department of Justice, and/or all components thereof, who have need of the information in the performance of their official duties.

Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

In addition, personal information may be disclosed from this system to members of the Judicial Branch of the Federal Government in response to a specific request,

or at the initiation of the FBI, where disclosure appears relevant to the authorized function of the recipient judicial office or court system. An example would be where an individual is being considered for employment by a Federal judge.

Information on this system may be disclosed as a routine use to any state or local government agency directly engaged in the criminal justice process, e.g., police, prosecution, penal, probation and parole, and the judiciary, where access is directly related to a law enforcement function of the recipient agency, e.g., in connection with a lawful criminal or intelligence investigation, or making a determination concerning an individual's suitability for employment as a state or local law enforcement officer. Disclosure to a state or local government agency, (a) not directly engaged in the criminal justice process or, (b) for a licensing or regulatory function, is considered on an individual basis only under exceptional circumstances, as determined by the FBI.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector pursuant to an appropriate legal proceeding, or if deemed necessary to elicit information or cooperation from the recipient for use by the FBI in the performance of an authorized activity. An example would be where the activities of an individual are disclosed to a member of the public in order to elicit his/her assistance in our apprehension or detection efforts.

Information in this system may be disclosed as a routine use to an organization or individual in the public or private sector where there is reason to believe the recipient is or could become the target of a particular criminal activity or conspiracy, to the extent the information is relevant to the protection of life or property.

Information in this system may be disclosed to legitimate agency of a foreign government where the FBI determines that the information is relevant to that agency's responsibilities, and dissemination serves the best interests of the U.S. Government, and where the purpose in making the disclosure is compatible with the purpose for which the information was collected.

Relevant information may be disclosed from this system to the news media and general public where there exists a legitimate public interest, e.g., to assist in the location of Federal fugitives, to provide notification of arrests, and where necessary for protection from imminent threat of life or property.

A record relating to an actual or potential civil or criminal violation of the copyright statute, Title 17, United States Code, may be disseminated to a person injured by such violation to assist him/her in the institution or maintenance of a suit brought under such title.

The FBI has received inquiries from private citizens and Congressional offices on behalf of constituents seeking assistance in locating individuals such as missing children and heirs to estates. Where the need is acute, and where it appears FBI files may be the only lead in locating the individual, consideration will be given to furnishing relevant information to the requester. Information will be provided only in those instances where there are reasonable grounds to conclude from available information the individual being sought would want the information to be furnished, e.g., an heir to a large estate. Information with regard to missing children will not be provided where they have reached their majority.

Release of information to Members of Congress. Information contained in this system, the release of which is required by the Freedom of Information-Privacy Acts, may be made available to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information in behalf of and at the request of the individual who is the subject of the record.

Release of information to the National Archives and Records Service: A record from a system of records may be disclosed as a routine use to the National Archives and Records Service (NARS) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

Mr. EDWARDS. Thank you very much for very effective testimony.

One of your suggestions, I believe, is that since the FBI's strongest case for its need for this investigative demand authority, is that because it has shifted its investigative priorities to white-collar crime or organized crime and public corruption, then the Bureau needs some additional process because these private and public custodians are becoming increasingly reluctant to deliver the information voluntarily, you are suggesting that the formula is too broad-based, and perhaps if

the FBI needs this process in these particular areas, are you saying that the CID should be limited to those areas.

Mr. PLESSER. I have no inherent objection to a CID or compulsory process. I think it has worked very well historically in other agencies. I think it can be used very effectively by the FBI. You have focused my concern to the extent that this investigative authority is extended to the FBI that it should be done so carefully upon justification in those areas where the FBI has a proven need for it. I think that computer crime and white-collar crime, may in the fact justify the creation of CID authority, but I think it should be looked at in the traditional way that CID authority always has been looked at, which is not to an entire agency, but to a particular type of enforcement activity.

Mr. EDWARDS. Would you say that it should be specifically not permissible in any of the other crimes listed in title 18?

Mr. PLESSER. I would say it should be permissible only in those crimes where the FBI can explicitly justify a need for it.

Mr. EDWARDS. Do you think there should be a penalty if it is used outside of those specifically authorized crimes?

Mr. PLESSER. You bring up a broader issue. I assume that the FBI will follow the constraints that are put into a statute. I think that perhaps there is a need in the entire charter for a civil penalty or recovery process, but that is not really an issue that I am prepared to discuss. As far as I am concerned, if there is a statute that allows it only to white-collar crime, I assume that they will use it only for white-collar crime.

Mr. EDWARDS. The charter requires, among other bases, that there be reason to believe that the records sought are relevant to an investigation within the criminal investigative authority of the Bureau. You think that is much too broad?

Mr. PLESSER. I think that is much too broad, and the burden is totally on the individual. It simply is an impossible position to put the individual in.

Mr. EDWARDS. Suppose the insurance company says, "We won't do it anyway"?

Mr. PLESSER. This is interesting in light of the privacy communications insurance investigations. We really were not aware of very much access by Government agencies to insurance records at all. Usually if there was a problem, the insurance companies voluntarily turned it over to law enforcement authorities to protect their own interests, if they identified a fraud or arson or something where they thought there was a problem.

In fact, there is an organization called the Insurance Crime Prevention Institute in Connecticut, whose sole job is to interface between insurance companies and law enforcement, so it is curious to me why the FBI needs access to insurance records at all. There just simply seems to be no history of it, but I think it is the same problem.

If banks don't want to give up the information, I think that that is not a reason in itself to grant the FBI investigative demand authority. As I said before, the FBI should be able to affirmatively justify their needs for such extraordinary authority in the case of particular parts of title 18.

Mr. EDWARDS. The witnesses yesterday emphasized that the largest problem they saw with the formula in the FBI charter was that any

delay in notifying the subject would be authorized in-house, and not by an outside agency, and they were afraid that this would just result in wholesale delays without any real examination. How do you respond?

Mr. PLESSER. I think that is true. Even if you are talking about a magistrate or a district court judge, I think you are not talking about a situation that will be overly burdensome. District court magistrates are readily available, in fact I would suspect that it would be almost more difficult to get the Attorney General to focus on a waiver than it would to get a U.S. magistrate to do so. I guess one of the problems is that it is not only the Attorney General, but it is the person designated by the Attorney General.

I think there is a tendency for that to become an automatic procedure, but what really concerns me is that there simply is no check on the system. I assume total good faith on behalf of the Justice Department and the FBI, but we are a system of checks and balances, and I think that if there is going to be waiver of notification—indeed I think it can be justified in some circumstances—it should be done with a judicial check, and not simply an internal check.

Mr. EDWARDS. Thank you, Mr. Plessler. The gentleman from Wisconsin.

Mr. SENSENBRENNER. Yes; Mr. Plessler, I am somewhat puzzled over why you and other witnesses are spending a considerable amount of your testimony in commenting on the CID procedure that is outlined in the charter, when if the CID procedure becomes ineffective as a result of amendments that might be offered in the Congress, the FBI or other law enforcement agencies could merely go to a magistrate and seek issuance of subpoena demanding the production of the same documents. Could you comment on that thought?

Mr. PLESSER. It could be more difficult to obtain a waiver within the agency, but from my point of view, the ability to get a check and balance from the judicial system is a traditional protection that I would like to see.

Mr. SENSENBRENNER. Second, Mr. Plessler, during your testimony you mentioned that the White House would be sending legislation up, relative to privacy of records, that is particularly aimed at the insurance and financial institutions industry. Do you have any information that the provisions governing production of these records in that legislation would be inconsistent with the FBI Charter?

Mr. PLESSER. No. The NTIA and the White House have sent, I think 2 weeks ago, requests for legislation up to the Hill. What they did in insurance and banking is dealt only with the first problem of the expectation of confidentiality. They dealt only with the responsibilities of the recordkeeping institution. They did not deal with the role of government, the rules on government, and as I said in my statement, they expect to put legislation upon those portions within 6 months or a year.

I am no longer with them, and what I suggested in my paper perhaps is that Congress wait until those proposals come up, so that a unified policy can be developed.

It is not that the charter would be inconsistent with those proposals, but that the charter would certainly, I think, be inconsistent with those proposals, if those proposals follow the Financial Privacy Act of 1978, which I think they are likely to do.

Mr. SENSENBRENNER. I yield back the balance of my time.

Mr. EDWARDS. Counsel?

Ms. LEROY. Mr. Plessner, the FBI Charter's investigative demand provision only applies, as you know, to certain specific kinds of records, and they overlook certain other kinds of records which may be equally sensitive; for example, employment and medical records. I wonder if you would care to comment on that, and to perhaps suggest how you feel that access to those records ought to be handled?

Mr. PLESSER. I think that on medical records, the FBI has to testify for themselves. They have not done it, I suspect, because Congress is in the process of considering a medical records statute, and indeed I think it is appropriate to have access determined on the basis of the medical recordkeeping. As far as employment records are concerned, that is a very difficult area. It is the largest recordkeeping area on individuals, and I may pull myself away from some of my brethren in the privacy filed by my next comment, but I do believe it.

There was a case called *United States v. Donaldson* on the Supreme Court, where the Government wanted to get access to employment records maintained about a circus performer employed by Ringling Brothers, and the performer objected. The Court, I think quite correctly, said that how much an employer pays an employee and how often the employee has gone to work, are really the employer's records. Some of those records in the hands of an employer may be employee records, to the extent that an employer maintains medical facilities, to the extent that they provide insurance, to the extent that they provide social service-type benefits to an individual. I think the individual should have an ascertainable interest.

As far as attendance sheets, payroll records, and things like that, I think it is a much more difficult issue. I think that those issues of employment confidentiality should be considered.

For example, under this standard, an employee is subject to one standard when he is working, and if he has insurance records, he is subject to another standard, and I just do not see that as an appropriate way of revolving these problems.

Ms. LEROY. The FBI and the Justice Department have argued that, with respect to the idea of creating uniformity in terms of treatment of access to records, different kinds of records have different levels of sensitivity attached to them, and therefore perhaps would require different safeguards in terms of access. They have argued that the toll records and insurance records covered by the charter, for example, are less sensitive than the financial records covered by the Right to Financial Privacy Act, and that perhaps it is justified in treating them with somewhat less sensitivity.

Mr. PLESSER. It is also covered in charter or financial records other than those covered by the Financial Privacy Act. I cannot distinguish those between the Financial Privacy Act credit investigative files or retailer records on credit extended where they don't issue cards. I think that there needs to be a national policy and it needs to be rationalized.

I think the Privacy Commission did not say that our study was aimed at record systems, and I think we were sensitive to the fact that there are some systems that are different than others. You need to apply uniform standards, and if you decide that this group needs protection, then you provide uniform standards to that group. If you

decide this group does not need protection, then you do not give it protection.

What I am really objecting to is what I see, a trend to not only create records differently, but to create different levels of protection for each different records system, for each different agency, and I guess you know lawyers like myself will have a very nice future trying to interpret the vagaries. It is going to become like the IRS Code. It is going to be which section applies to which kind of request for which kind of investigation. I simply think that it will create far too complex a system to be meaningful in terms of the extension of individual rights.

Ms. LEROY. I have one last question. You suggest in your testimony that one of the problems with the charter is that the procedures for obtaining access and the procedures for notice and the procedures for challenge are not sufficiently detailed, that is, with respect to the records that are not covered by the Financial Right to Privacy Act. The charter requires that those records and access to those records be controlled by guidelines that they expect the Attorney General to draw up. Would you be satisfied if the kinds of specific procedures and details you are talking about were placed in the guidelines rather than in the statute itself?

Mr. PLESSER. I can't answer that unless I saw it. I think there may be—

Ms. LEROY. Assuming you got to draft them.

Mr. PLESSER. I think there may be some sections in the statute that really need legislative direction, like notification, but I don't think the Attorney General could write a regulation to require banking institutions or insurance institutions to notify recordkeepers, to require recordkeepers to notify their customers of the process. Of course, the Financial Privacy Act of 1978 was amended to take care of a problem, so that recordkeepers would not have to notify old accounts and dormant accounts and things like that. I am not sure that that can be done simply by regulatory authorities in the Attorney General. I think a detail like that needs to be legislative.

I think that I could go through and write you a letter after the hearing and say what sections I think need to be done legislatively, and that the rest certainly could be done by regulation. The specifics of the notice and the subpoena could all be done by regulation, but I would hope that it would be promulgated subject to rulemaking, hearings, and citizen participation, which would be a procedure not usual for the justice demand in creating demand authorities.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

I regret that I was late. I have read your very fine statement. One of the points that struck me particularly was your observation that what is being asked in the FBI charter would give to the FBI something different from any other agency, and you make the point that we should have the benefit of uniformity across the board. That, I will bring up with the FBI.

I take it, on page 2, that you are opposed to what is being requested here.

Finally, the enactment of the government access provision will result in giving the FBI for the first time general authority to compel the disclosure of certain documents through the use of civil process prior to the initiation of litigation or

grant jury consideration without any concomitant limitation on the use or dissemination of such information.

I take it you feel that this is shattering precedents and that it is undesirable.

Mr. PLESSER. I think so, and as I suggested to Chairman Edwards, I am not opposed unalterably to the concept of investigative demand. I think that there can be legitimate cases, but I think it should be done on a specific need justification basis, and not for total investigation of title 18.

Mr. DRINAN. Thank you very much. I am certain that your testimony will be very, very helpful to us as this matter develops. Thank you.

Mr. PLESSER. Thank you very much.

Mr. DRINAN. I yield back the balance of my time.

Ms. LE ROY. If we follow your scheme, which—

Mr. PLESSER. My scheme?

Ms. LE ROY. Well, your suggestion to permit the FBI to use the CID only in connection with certain specific crimes, what happens to access to records with respect to the other crimes in title 18? Would you go with informal access?

Mr. PLESSER. They have obviously been able to use other means, summonses, subpoenas, and I think those would still remain available to it. We are not taking anything away. It is just a question of what is to be added.

Mr. EDWARDS. This would be a good time to break, and we thank you very much.

Mr. PLESSER. Thank you very much. I have enjoyed it.

Mr. EDWARDS. We will recess for 10 minutes.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

Our next witnesses are from the Department of Justice and the FBI. They are Paul Michel, Associate Deputy Attorney General, U.S. Department of Justice; Francis Mullen, Assistant Director, Criminal Investigative Division, FBI; and our friend of many years, John Hotis, Special Assistant to the Director, FBI. These witnesses, particularly Mr. Hotis and Mr. Michel, are responsible for much of the drafting of the charter and can answer all our questions about the particular provision we considered yesterday and are considering today.

I understand you don't have prepared statements, gentlemen, but if you would care to make a few general comments, please proceed. We will have plenty of time for question afterwards.

**TESTIMONY OF PAUL MICHEL, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; FRANCIS MULLEN, ASSISTANT DIRECTOR, CRIMINAL INVESTIGATIVE DIVISION, FBI; AND JOHN HOTIS, SPECIAL ASSISTANT TO THE DIRECTOR, FBI**

Mr. MICHEL. Mr. Chairman, I would just like to highlight two main points which brought us to the decision that the investigative demand provision was required in order for the FBI to carry out its responsibilities. The first consideration is simply that our current and

recent experience establishes a clear need; that is, we cannot get the records that are needed now to carry out the investigations in a broad range of areas. This has come about largely because of decisions made by the third party recordholders, and there are really no alternatives to compulsory process of power.

Grand jury subpoenas are largely unavailable for the early stages of investigation, and also for some special cases such as fleeing fugitives, where it would just be completely improper to use a grand jury because there is no crime that could lead to an indictment.

Mr. EDWARDS. The fugitive flight to avoid Federal prosecution—Federal or State prosecution—is a crime.

Mr. MICHEL. But the crime has already occurred, and the grand jury would not be issuing some further indictment where our main goal is simply to find the man as he flees across the country, and bring him back before the court to stand trial on the prior indictment. There are those kinds of special cases, and then there is just a general need, because of the decision of the recordholders themselves, no longer to permit informal access or any kind of access without compulsory process.

I think it is also important to recognize our basic need and the reality of our circumstances really cuts across the board, and involves virtually all types and categories of crime, and is not limited to one category.

I think, too, that in talking about the FBI's circumstance, it might be helpful to the committee to focus on what I think is the most closely analogous situation, which is not the SEC, which was mentioned, and not the IRS, which was also mentioned, but the inspectors general. When Congress in 1978 created inspectors general in about a dozen departments, they provided the inspectors general, as you know, with full subpoena power. I think that that reflected a congressional recognition that those officers could not perform their mission without that kind of broad power.

Now actually the power sought from Congress by the Department and the FBI in the proposed charter is far more limited, first because it does not run to subjects, but only to third parties. Second, because it only runs to four specifically identified categories of records, and not to records in general. Third, because it is limited to circumstances where there is already a basis for an investigation, and a proper investigation for a crime underway, whereas the inspectors general can issue subpoenas for civil enforcement as well as criminal and for administrative purposes as well as court litigation preparation. So we tried to tailor a far more limited subpoena power than that which Congress recently gave the IG's, but one which still has the effectiveness to allow us to accomplish our mission.

I might, if you will, make just two or three quick comments about protections. It is assumed by some in the discussion of what protections are workable and appropriate that the Financial Right to Privacy Act provides what might be termed a perfect model, and therefore it should be followed in every regard for every kind of record, not only the records covered by the act.

Of course, the charter contemplates that for records that are covered by the act, the act has to be followed 100 percent with no change whatever. But the charter reflects a decision not to extend to those other categories of records, such as toll records from the telephone

company, the exact same protections and procedures and provisions of the act. I would just suggest, or bring to the committee's attention, that the early experience under the act has not been entirely happy as far as law enforcement needs are concerned.

I think the general purposes of the act have been well served by its provisions, but it has created special problems for law enforcement, and we have been collecting examples. Some of them are very extreme and upsetting; for example, where banks won't report robberies that have occurred or turn over video tapes that would help us identify the perpetrator.

There are, therefore, in addition to studies, amendments to the act under progress within the Department on behalf of law enforcement. Special note was made by Mr. Plessner with regard to some of the variances between the kinds of procedures provided in the act and those provided for toll records and the other nonact records in this charter. He focused, as others have, on the fact that the Attorney General or his designee, rather than a court, would be the decision-maker on problems of delay.

Some have suggested that that would result in lower standards, and the Attorney General has testified that it is his expectation that it would be the opposite, that there would be higher standards; and second, that there would be uniformity, because it would be nationwide, whereas each magistrate or judge might be applying substantially different kinds of tests or coming up with substantially different or inconsistent decisions.

Second, it has been suggested that there is some kind of inherent conflict of interest in the Attorney General making such decisions which involve balancing privacy interests and personal interests of people under investigation with his responsibilities to see that laws are faithfully executed and investigations are pursued vigorously and, if possible, successfully. I do not think that there is any difference, essentially or inherently, between that kind of decision which he and his delegates have to make all the time in many other areas.

I think that there is a record which has been subject to congressional oversight and review in terms of things like consensual monitoring, in fact issuance of grand jury subpoenas, another area where decisions are made all the time by the Attorney General, and prosecutors working under his authority as his delegates. So I do not think that there is really any basis for expecting that the result of this variation would be a lessening of privacy protection. I think it really would run the other way.

The final point I would like to make in terms of protections goes particularly to the suggestion that litigation should be made easier for the records subject, and that appellate stages should be added to the process.

I think it is very important to remember that, unlike the normal Government administrative agency gathering information for purposes of regulating an industry or studying some general problem, we are talking here about an investigative agency which, under this charter, is rather strictly and narrowly limited to pursuing people who apparently, on the basis of facts and circumstances known to the FBI, have violated the criminal statutes enacted by the Congress, and they are therefore under investigation as suspects.

It seems to me that the Congress might want to hesitate and carefully consider the effects of arming potential defendants, subjects of investigation, with the power to delay investigations, where the motive really has nothing to do with privacy protection, but the motive has to do with (a) try to find out as much as you can about how much they already know about me; and (b) tie them up in the courts for as long as possible, to gain the advantages that often flow to a suspect of criminal activity from the passage of time. It seems to me that whatever the privacy considerations viewed in general, where you are talking about various Government agencies, and you are talking about ordinary citizens, that the context is significantly different than when you are talking about the primary criminal law enforcement and investigative agencies of the Federal Government, and you are talking about people who are the subject, not ordinary citizens, but people who are under the terms and standards of the charter properly subject of criminal investigation. The context, I think, is so different that it is appropriate as well as necessary from our standpoint to have different protections and procedures, and to strike a somewhat different balance, if you will, than might be appropriate in the case of other agencies and other sorts of circumstances.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Michel.

Mr. HOTIS? Mr. Mullen?

Mr. HOTIS. I have no further comments, Mr. Chairman.

Mr. MULLEN. No, sir.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

If I may, this is a question anybody who wants to may answer. If I may, let's talk about the practice of the banks. We heard yesterday that the banks are resisting the demand, and under the law they are able to do that. I am wondering what happens when the bank resists and the document is not forthcoming.

Mr. HOTIS. In some jurisdictions, Congressman, we can obtain a subpoena for the records, but in many cases there is no sitting grand jury, so that results in considerable delay.

It is also a problem, Congressman, in many cases where there may be adequate information for an investigation, but there is not enough information to present the matter to a grand jury. There simply is nothing before the grand jury to consider and to issue a subpoena for, so we just simply don't get the records in many cases.

Mr. DRINAN. But how many banks are doing this? Yesterday there was testimony that this is the growing trend.

Mr. HOTIS. I don't have the numbers, but I can certainly try to get further information on that. I know that yesterday the Riggs Bank was mentioned. Bank of America, I believe, is also included. I do not have the names of any others at the moment.

Mr. DRINAN. Does the FBI talk with the banks before or after they refuse to honor the formal written request?

Mr. HOTIS. We formally talk to the bank before we make a formal written request. Invariably it is denied, or we are given some indication in advance that they will not honor a request. The difficulty, Congressman, is if we do submit the formal written request, is that it triggers the notice requirement, and since the likelihood of having it honored is so small—

Mr. DRINAN. Are some banks putting into their literature a promise to their customers that they will not reveal the information without the consent of the person who banks?

Mr. HOTIS. I believe that is correct. Citibank of New York has notified its customers that it will not provide information without a subpoena.

Mr. DRINAN. As you know, this is a very sensitive matter, and if we are going to ratify and give to the FBI this right to have a formal written request on order, then we are in effect qualifying the privacy of the people in a matter where they anticipate privacy. How can you respond to that?

Mr. HOTIS. Congressman, the decision to provide financial information through subpoenas was already made by Congress in the Financial Privacy Act. The judgment was made at that time that where an agency has statutory authority to issue administrative subpoena that it could use that authority. It just so happens that the FBI is not one of those agencies. All we are asking is that we be included among those agencies that have subpoena; powers in every other respect the provisions of the Financial Privacy Act would apply to us.

Mr. DRINAN. But what is the standard for the use of an administrative subpoena in other agencies?

Mr. HOTIS. Well, it certainly varies considerably. I believe that an inspector general can issue a subpoena, if he believes it is necessary or desirable, on his own judgment. I think that differs substantially from the requirement, say, of the charter, where at the outset we have to be able to establish facts or circumstances that reasonably indicate an actual or potential violation of the Federal law, and then beyond that meet all of the other requirements that now apply to regulatory agencies using the Financial Privacy Act.

Mr. DRINAN. But you are a law enforcement agency and not a regulatory group. Does that make a difference?

Mr. HOTIS. I think it certainly makes a difference in terms of the governmental needs that have to be met.

Mr. DRINAN. So you really should not be complaining that your agency is different from other agencies. Therefore we can't simply say say if the other agency has it the FBI should have it.

Mr. HOTIS. No, I am not really complaining.

Mr. DRINAN. You are the only police, the only law enforcement group in the country, in the Federal Government, and as a result very special provisions have to be made.

Mr. HOTIS. Yes; I appreciate that.

Mr. DRINAN. So your analogy does not hold water at all. You just said that all you are asking is what other agencies have. You are not like other agencies. That is why you need a separate charter, so that analogy just does not convince me, but maybe I am missing something.

Mr. HOTIS. No. My point was that Congress had previously made the decision that financial privacy records of this kind would be made available under a subpoena, under certain circumstances, and we are just simply saying that we believe that we should be included among those agencies that have those powers.

Mr. DRINAN. In the proposed charter you specify, I think, four things, and you don't specify employment records or medical records. Tell me what happens now, of you want employment records.

Mr. HOTIS. It varies throughout the country. We now can get informal access to employment records in many cases, largely because there are no statutes that establish a right of privacy in those records, and largely because the nature of those records varies from one place to the other in many cases.

As Mr. Plesser pointed out, there is very limited information about an individual on those records. In addition, the courts have indicated that the records are the property of the employer, not the employee, so there has not been the same degree of concern about employment records as there are in these other areas.

Mr. DRINAN. But it may be that the Congress will, in the relatively near future, extend the Privacy Act to cover medical records. I am on a subcommittee of Government Operations that is working on that. Shouldn't we therefore in the FBI charter anticipate that, and say that people have a clear expectation of privacy in their employment records and in their medical records, and should not we take that into consideration?

Mr. HOTIS. I would think that there certainly is a very strong argument to be made about the confidentiality of one's medical records. I think there is a lesser argument with regard to employment records as a general rule. I can state quite frankly that one reason we did not include medical records in this provision was we thought that it might be misconstrued. Those records are indeed so sensitive in many cases there would be strong opposition to the Bureau being able to have compulsory process to obtain access to them.

Mr. DRINAN. I am afraid that my 5 minutes have expired. If you have any additional information on the banks, it would be very interesting to our colleagues. Other Congressmen who testified here yesterday clearly think, urge very strongly, and feel very deeply that bank records should be protected even from the FBI, and that there should be no exemption or exception or diminution of the safeguards and guarantees put through just last year under the Privacy Act.

Thank you very much.

Mr. EDWARDS. Mr. Volkmer.

Mr. VOLKMER. Thank you very much, Mr. Chairman.

Would you have objection to a suggestion that was made yesterday that perhaps before a demand could be issued it would have to be approved by the U.S. attorney in the area in which it was to be served, rather than the Attorney General or his designee, or have you given it thought?

Mr. HOTIS. I really have not given it enough thought, Congressman, to know where in the Department of Justice that decision should be made.

Mr. VOLKMER. Would you give it thought and get back to us in writing as to how you feel on that, and how it would affect the whole operation?

Mr. HOTIS. Yes, sir.

Mr. VOLKMER. The other thing that was brought up yesterday and pointed out to us by minority counsel is that even though it says that they shall disclose, that there is actually no enforcement other than going to court to require it. Do you agree with that?

Mr. HOTIS. That is correct.

Mr. VOLKMER. And that is what is intended?

Mr. HOTIS. Yes, sir.

Mr. VOLKMER. And there is no civil or criminal penalty on the institution for failure to turn it over even though a demand has been served?

Mr. MICHEL. Congressman Volkmer, the institution conceivably could end up in a potential contempt citation. The charter does not try to add to the power of courts, either civilly or criminally—

Mr. VOLKMER. That is correct.

Mr. MICHEL [continuing]. To enforce production of the records, but it relies instead on the present inherent power of courts to hold parties in contempt for noncompliance with court orders.

Mr. VOLKMER. No, no, let me go back before we go into that. Let's go back. Let's get a factual situation. The demand is issued, approved and issued, served on the institution, whatever it may be. They decide they are not going to give up the records. They tell you so. You go then to court. That is the next step, is that correct, and the court then says to the institution you do it. The bank then does it. There is no problem, is there? Is that correct?

Mr. MICHEL. Correct.

Mr. VOLKMER. There is no penalty to the bank for initially refusing?

Mr. MICHEL. Correct.

Mr. VOLKMER. Civil or criminal?

Mr. MICHEL. That is correct.

Mr. VOLKMER. None contemplated?

Mr. MICHEL. None contemplated.

Mr. VOLKMER. So at any time under the charter provisions that we have, the bank can just say as a matter of fact to everybody concerned initially at any time, even when they initiate a deposit with them, or an account with them, that we are never going to turn over your records without the court telling us to, and be within their legal authority?

Mr. MICHEL. That is correct, and that is the same circumstance that a bank is now in with regard to a grand jury subpoena.

Mr. VOLKMER. Right.

Mr. MICHEL. If it is subpoenaed to produce the record of customer X, it has the option on its own of contesting the subpoena, and not turning over the records until after the court has ruled on the legality of the subpoena, so we simply accord the same procedural treatment to these records.

Mr. VOLKMER. And in the meantime if the bank wishes to, it can notify its customer that they have received the demand order in the meantime?

Mr. MICHEL. That is correct.

Mr. VOLKMER. And even though you have decided to exercise a waiver of the notice provision, because of one or the other reasons. Let's say that there has been a delay in notice to the customer himself.

Mr. MICHEL. That is little unclear in the law. There are circumstances where grand jury subpoenas are accompanied by—

Mr. VOLKMER. I am not talking about a grand jury subpoena.

Mr. MICHEL. I understand that, but are accompanied by a request to the bank or the telephone company not to notify the customer, under current practice.

Mr. VOLKMER. Right.

Mr. MICHEL. And what the charter does is to formalize that process a little bit.

Mr. VOLKMER. Right.

Mr. MICHEL. And to make it more enforceable, because the magistrate could be asked conceivably to hold in contempt a bank that, in the face of the decision that notice should not be given, nevertheless went ahead and gave it.

Mr. VOLKMER. In other words, let's go back to the factual situation, and at the time the demand is served on the institution, the bank is served, according to the charter, with notice that there has been a delay in advising the customer.

Mr. MICHEL. That is right.

Mr. VOLKMER. And the bank knows of that?

Mr. MICHEL. That is correct.

Mr. VOLKMER. Then if the bank does notify the customer, in violation of that provision, what provision in the charter does anything to the bank?

Mr. MICHEL. Well, it is —

Mr. VOLKMER. You haven't gone to court yet?

Mr. MICHEL. No, but we would go to court, in that circumstance, and I think, although the charter does not very expressly cover it, that our intention was that we would try to enforce, through the courts, both the demand itself for the record and the determination that notice ought not to be given.

Mr. VOLKMER. But what if in the meantime the bank president has called up a good customer and says, "Hey, look what I got. I have got a demand down here. I just want to let you know about it. We will probably go into court in 10 days, a week or 4 days on it." Now, what is the magistrate going to do to him for doing that? He is not in contempt of any court order?

Mr. MICHEL. That is correct.

Mr. VOLKMER. There is no penalty in here for violation.

Mr. MICHEL. It may be that the charter should be clarified or amended to make a more explicit treatment of that problem of how to enforce a decision that notice ought not to be given. I think you have highlighted a gap in it.

Mr. VOLKMER. I would like for you to think about it. Maybe some of the other members would like to discuss it.

Thank you very much, Mr. Chairman. I think my time is up.

Mr. EDWARDS. Do you have an observation on this?

Mr. HOTIS. I was just going to say, Mr. Chairman, that the questions regarding to the effect on the bank of various situations that Congressman Volkmer pointed out would be determined by the provisions of the Financial Privacy Act. It is not our intention under this charter to change any of the rules that presently govern bank records and financial records.

Mr. VOLKMER. Mr. Chairman, if I may get back because of that, as far as those are concerned, but what about the other institutions?

Mr. HOTIS. All of Mr. Michel's observations would apply to record held by other institutions.

Mr. VOLKMER. That are not covered by the Financial Privacy Act?

Mr. HOTIS. That is correct.

Mr. VOLKMER. You would want those to be the same as the Financial Privacy Act as far as covering those situations; is that what you are telling us?

Mr. MICHEL. No; we would want the determination that notice ought not to be given to be as enforceable, and enforceable through the same method for the records not covered by the act.

Mr. VOLKMER. Insurance records, employment records, or something like that?

Mr. HOTIS. Correct. We would want to be able to get the courts to enforce through contempt power the determination that notice ought not to be given. As to those records, you have pointed out a possible gap in the charter.

Mr. EDWARDS. We will recess for 5 minutes.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. I would like to pursue this. As I came in, Congressman Drinan was talking about this, that is, banks, and what they were doing under the present law. I understand from the discussion earlier with you—and correct me if I am wrong—that none of the institutions that you have served demands on have voluntarily just performed. Is that correct?

Mr. HOTIS. That is correct, Congressman, none of the major banking institutions voluntarily provide such information. There may be some institutions elsewhere that have been cooperative, but to my knowledge the general practice throughout the country is not to honor formal written requests. That is true, I might add, even though honoring a formal written request would not expose the bank to any liability.

Mr. VOLKMER. That is the present situation. What is the present situation in regard to other records of other institutions that you may have attempted to obtain records from, whether it be insurance, credit telephone, or anything else? What is your record there?

Mr. HOTIS. We are experiencing increasing difficulties throughout the whole range of the areas where records are needed by the FBI. Certainly that is true with the telephone toll records, as we indicated earlier. American Telephone & Telegraph simply will not provide the information to us unless it is upon receipt of a civil or criminal subpoena. We are having the same problem with some airline companies, major oil companies, some major hotel chains in addition are refusing to provide the information to us without compulsory process.

Mr. MULLEN. Congressman, if I can interrupt, we have several lists here containing examples of where we have had difficulty, which I would like to make available to the committee.

Mr. VOLKMER. Mr. Chairman, could those be introduced and made part of the record?

Mr. EDWARDS. Are they susceptible to being part of the public record?

Mr. MULLEN. Yes, sir.

Mr. EDWARDS. Without objection, they will be made part of the record.

Mr. MULLEN. I will make those available.

We have run into examples where in fugitive cases we cannot obtain a subpoena due to departmental policy. Yet the cooperation in the case I have in mind, a hotel chain, will not make the information available without the subpoena, and we have absolutely no way to proceed in order to obtain the information—

Mr. VOLKMER. To verify that a person——

Mr. MULLEN [continuing]. The identity of a guest to get a home address, phone calls that may have been made, something like that.

Mr. VOLKMER. You are talking about Justice.

Mr. MULLEN. Yes, sir.

Mr. HOTIS. If I may elaborate, Congressman, we do have a case that we will submit for the record. As we indicated, the American Telephone and Telegraph will not release the records without receipt of a subpoena. The Department of Justice has recently ruled that a grand jury subpoena is not available for fugitive investigations where it is to be used simply in locating and apprehending a Federal fugitive. The effect is to cut us off from all access to telephone records.

In one case involving a top-10 fugitive who was being sought for air piracy, kidnaping, and conspiracy, our investigation determined that his former wife was in telephone contact with the man. We were denied access to her telephone toll records.

We simply wanted to know what calls were being placed so we could ascertain his location, but we could not get those records. It was subsequently learned that she was also wiring money to him in California. This money was being deposited in a third party's bank account. We were denied access to the bank account information until the bank was in receipt of a subpoena. We engaged in many hours of negotiations between the counsel for the bank and our own legal counsel's office. Finally they were convinced that the information could be provided, that it did not require notice to the customer.

This greatly hampered our investigation and delayed our final apprehension of this fugitive for a considerable period of time. It is a substantial problem that we are confronted with. We had a case recently in Maryland where we attempted to obtain credit card records relating to a Federal fugitive who was wanted for bank robbery.

When we made a request for the records, the credit card company, following the State law, notified the individual that we had made a request, and he fled the State.

Mr. VOLKMER. The other question I have is—if I remember right, and correct me if I am wrong because it is still the same position—back when we had the Attorney General and the Director of the FBI testify, there was some question as to whether the Attorney General should be the one to issue the delay, authorize the delay and notice, or whether it should be done by the magistrates. If I remember right, their position was that there would probably be more control with the Attorney General doing it than with the magistrates doing it, who may just do it in a cursory way. Is that still the position of the FBI?

Mr. HOTIS. That is correct. That is the bureau's position and certainly the Department of Justice's position. We think that in fact one of the primary purposes of this charter is to fix accountability and to fix responsibility, and that is really done best when it is put in one location—in the Department of Justice, for example, as distinguished from spreading the responsibility for those determinations throughout the country with every Federal magistrate.

Mr. VOLKMER. Periodically, if that would be the case, it could end up being the case, you see no objection I am sure—and this would be addressed to the Attorney General—for this committee or the Senate committee to review what has been done in regard to the issuance of those delays and the occasions on which they have happened?

Mr. HOTIS. That does get into a very sensitive area, of course, of access to records. We certainly have no reservations at all about providing information regarding the policies, procedures, and the programs of the Bureau. There may be some difficulty in obtaining access to individual investigative files in order to determine how those judgments have been made.

Mr. VOLKMER. What if names were deleted, places were deleted, et cetera, but the circumstances were all set out? Members of the committee only would be able to review those, would they not?

Mr. HOTIS. I am sure that we can work out some procedures, Congressman.

Mr. MICHEL. Congressman, it also should be remembered that the charter explicitly requires the Attorney General to promulgate guidelines—

Mr. VOLKMER. That is correct.

Mr. MICHEL [continuing]. Governing the use of this investigative demand. And that the charter further requires that before being promulgated, these guidelines in draft form be shared with the committee for review and comment. We contemplate that the oversight committees would have a very extensive role and influence in the final provisions of those guidelines. I would think that the standards and the factors and the other parts of the guidelines would actually be much more effective in seeing that this power is used with good judgment and discretion and properly in every regard than some kind of review of individual investigative files. But I certainly think that Mr. Hotis is correct, that through some device it should not be too difficult to work out a review of the case-by-case application of those standards.

Mr. VOLKMER. All I am saying is if it is done. I am sure there are going to be those within the Congress who are going to have very serious doubts about it, and somehow those doubts are going to have to be allayed. I don't believe just be reviewing the guidelines beforehand that it is going to erase that.

Mr. MICHEL. I believe both procedures, case-by-case review under some appropriate arrangement and guideline review can and should be done.

Mr. VOLKMER. Thank you.

Thank you very much. Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Volkmer. I think it is pretty clear that the committee would agree with Mr. Plessner that to do an effective job, with which you are charged, this device of the investigative demand is appropriate if it is worked out carefully, and if rights are protected. That has been the general testimony of the witnesses to date, and the communications we have received.

I think it is important that you make a case for the extent of difficulty you are having. You have made it today to a certain extent. There should be some kind of a survey made within the Bureau on a bureauwide basis, as to how much difficulty agents are encountering, and in what kinds of cases. You have mentioned fugitive cases, but how many are we talking about, and how serious is the difficulty? Certainly if it is getting in the way of catching the top 10, that is very serious.

Police departments have problems, too, throughout the country. They are after a lot more fugitives than you are by far, probably

100 times or 1,000 times; I don't know how many times, they are so large, the police departments of the United States. I think the Los Angeles Police Department has more policemen than the FBI does agents. What kind of problems are they having? Do they need this kind of device? Is that much more important than major criminal cases in New York and Los Angeles, Mr. Horis?

Mr. HORIS. I certainly would not be so presumptuous as to say that our cases are more important. I think it is a different kind of investigative need that we are addressing, particularly where we are talking about a fugitive investigation that may cover several States or the entire country. It is more difficult to locate an individual under those circumstances. I don't think that a metropolitan police department relies quite as heavily on record information as the FBI does.

Mr. MICHEL. Indeed, Mr. Chairman, what happens is as a practical matter—and I am aware of it, having been first a local prosecutor and then a Federal prosecutor, that the vast majority, I think, of the fugitive cases being pursued by local police and prosecutors are generally in the category of no-shows for trials. They are not necessarily fugitives who flee, but they just did not show up at their trial, and sometimes they are found at their home or their place of work or with their best friend or at their neighborhood bar, and things of that sort.

The hard case where there is evidence that they literally fled gets turned over to the FBI, and involves the interstate aspects, and the difficulty of tracing people down from motel to motel and that kind of thing. This puts us precisely into the posture that we were trying to describe, where we are very much handicapped if we cannot get record information.

Mr. EDWARDS. I am sure I would agree with you, but I think that a better record has to be made.

Mr. VOLKMER. Mr. Chairman.

Mr. EDWARDS. Mr. Volkmer.

Mr. VOLKMER. As a matter of thought, perhaps either in the charter or in the guidelines there can be differences as between those investigative demands done for purposes of investigatory procedure to develop a case, and those provisions relating to a person who actually has an arrest warrant out, is a fugitive from justice, an escapee, or what have you.

Mr. MICHEL. I think you are right, Congressman Volkmer, and again our contemplation is that those relatively fine or complex distinctions could be better made on further study and articulated in guidelines.

Another area which I think Mr. Plessner raised and others, perhaps, are also concerned about, which I think guidelines can and should deal with, has to do with dissemination. Of course, grand jury information and the records made available pursuant to grand jury procedures are governed by rule 6(e) in case law procedure interpreting those rules. Certainly we would want to study carefully whether some roughly analogous rules ought to apply to records obtained under a compulsory process, if the Congress provides it.

Mr. EDWARDS. That's a very good point. There is a big difference between just the beginning of an investigation and a fugitive who is running around the country doing all kinds of unpleasant things. The testimony that has developed in communications we have received

pose several problems that you gentlemen are better acquainted with than I.

Mr. Volkmer mentioned that probably the No. 1 is the in-house decision to be made for delay. I am sure you understand that if that is ever used in the future, that there would be severe criticism, and it would be a focal point for criticism because it is in-house. People would have a tendency to say "Well the FBI and the Department of Justice are one and the same." People are going to say, and I will say the same thing, how do we know that there is not some rubber stamp sitting there? How do we know that, Mr. Hotis?

Mr. HOTIS. As Mr. Michel pointed out, the starting point for procedures regarding waiver of notice would be Attorney General guidelines that will be reviewed by this committee and other committees of Congress before implementation.

In addition, our internal policies and procedures would be made available for review by appropriate committees of Congress. Beyond that, you will have given your normal oversight function that will be exercised.

Mr. EDWARDS. Knowing you have complied with the rules, if that particular person sitting there is doing it on a wholesale basis, how do we know?

Mr. HOTIS. Of course, there is the problem that there will be an individual somewhere at some time who may violate the rules. It seems to me that the starting point at least for proper oversight—and I certainly am not attempting to spell out any boundaries for oversight; that is not my position to do that. But initially I would think that the major concern would be with the institutional policies and programs. Are they proper? Has the Director set up appropriate inspection mechanisms and means within the bureau to insure compliance with the rules? And is he following through on those mechanisms?

Now that takes care of a large area of concern that the Congress would have, but nobody can guarantee that at some point somewhere some individual, agent or other official in the Bureau or the Department might not use appropriate judgment and might violate a rule.

We would hope that our internal mechanisms would uncover a situation like that. In addition, of course, if something were to be brought to the attention of the committee that raised problems about the propriety of how the authority had been exercised, we will, as we have done in the past, and as recently as a few days ago, come in and brief the committee and provide whatever information is available to the committee to insure that the committee knows all of the facts in the case and can make its own judgment.

Mr. MICHEL. Mr. Chairman, if I could add a point to that, it seems to me that we have a rather good track record with regard to the domestic security guidelines issued in early 1976 by Attorney General Levy. We have more than 3 years of case-by-case experience of decision making based on standards that Congress in effect helped us formulate, and I have not heard from any court any challenge or question about whether those standards were being applied fairly and properly, and as they were intended. I believe that there have been reviews as an exercise of oversight through some device or other, but I don't remember the details, to satisfy the congressional question about whether the guidelines in fact being properly followed, and that those reviews were

worked out, and that they led to the conclusion that the answer was an absolute and unqualified yes.

Mr. EDWARDS. I think that is a responsible answer that you both gave. Have you thought or discussed the possibility of a public defender type appointed out of say the Civil Rights Division on a rotating basis, an office being set up to represent the subject of the investigation as these decisions are made?

Mr. HOTIS. I had not considered that possibility, Mr. Chairman. We will consider any other mechanisms that you might think are appropriate to insure that this authority is carried out responsibly.

Mr. EDWARDS. Statistics would be reported as to how many requests had been made, how long the delays were, the nature of the delays, postponements, and so forth, I presume?

Mr. HOTIS. Yes.

Mr. EDWARDS. And they would be made available to Congress?

Mr. MICHEL. Mr. Chairman, I think the essence of fair decision-making in this circumstance is, simply put, does the agent running the investigation have a factual basis for establishing one of the five grounds on the basis of which notice can be waived, such as flight or tampering with witnesses, and so forth?

The charter in effect requires that he be able to make a showing to the deciding officials that he has evidence that shows the likelihood of that harm occurring if notice is given, and it is not so much a question, I don't think, of the attitude of the people involved in the decision-making process or of their having some kind of almost adversarial position where one official argues on behalf of the records subject and the other argues on behalf of the investigator. The charter forces the investigator to come up with hard facts, and he either has them or he does not, and in many cases he would not. Where he does, I think the decisions will be fairly easy to make, and there will be little doubt in retrospective review by Congress or anybody else about whether the decision was proper.

[Discussion off the record.]

Mr. HOTIS. There is one additional point.

I am not sure that judicial intervention at the delay of notice stages is as crucial as one would think it is, if we compare the procedures we are outlining in our charter with the current practice with regard to the grand jury subpoenas. It is often assumed that some kind of a judicial determination was made when in fact that is not the case.

In current practice we will ask the assistant U.S. attorney to have a subpoena issued and it will be issued by the grand jury solely on the decision made by the U.S. attorney, and the U.S. attorney has full authority to decide whether or not there should be a waiver of notice in that case. That is a current practice in many of the metropolitan areas where there is a grand jury sitting year round.

To get back to your point, Congressman, the failure to comply can result in prompt contempt citation by the court.

Mr. EDWARDS. The easy out would be to involve the judicial branch. Why would you not want to do it?

Mr. HOTIS. I am not sure to begin with, Mr. Chairman, that the easy out is really the best out. I think it is easy and perhaps too easy to shift the responsibilities to the courts without really thinking through what interests the court is going to protect.

The questions that would be raised with regard to waiver of notice might go to such things as whether it would impair the investigation? Will the fugitive flee? Will evidence be destroyed? Is there a threat to the life of an individual?

I think that those matters are really properly left to the executive branch; they are not inherently judicial kinds of determinations.

Beyond that, I wonder whether we want to burden the courts not only with all the challenges that are going to come up under these procedures but also with the waiver of notice. There is going to be a large number of those.

Mr. EDWARDS. Well, I wonder if, in your judgment, that view that you just expressed, Mr. Hotis, could be reinforced by the Bureau and the Department's actions in connection with the request under the Freedom of Information Act?

Mr. HOTIS. I am not sure I understand the question.

Mr. EDWARDS. Well, it is a general belief, not necessarily shared by members of this committee, that there is a great deal of unnecessary resistance to requests under Freedom of Information. And I think the case can be made, I might add, even though it is not my case but I think a case can be made that sometimes extraordinary measures are necessary to dig out under the act, under the Privacy Act, under the Freedom of Information, information that should have been rather readily given.

So how do we know that same attitude would not prevail with the person or persons sitting in the Justice Department reviewing applications for postponement?

Mr. HOTIS. I am not sure that the problems we had with the Freedom of Information Act were attitudinal problems, Mr. Chairman. I think that the demands made by the act, particularly at the outset, were just overwhelming; we were unprepared to meet the high volume of requests.

As you know, we had a special project onslaught when we assigned several hundred agents to meet those requests. I believe that we meet the requirements at the present time but I am not fully conversant with all the problems, Mr. Chairman.

I understand the concern. To get back to the court again— if the decision is made by the court, I suspect that congressional interest in oversight will be lessened considerably because you will feel rather comfortable that the courts are administering the rules in accordance with the statute. So I would think that your interest would diminish.

If we administer it, I would expect you to be fully apprised at all times as to how we administer it, and we think that is a fair trade.

Mr. EDWARDS. Thank you, Ms. LeRoy?

Ms. LEROY. Thank you, Mr. Chairman. One last question about delay of notice, and I promise I will change the subject.

The charter provides that the Attorney General can designate someone else to make the decision that notice should be delayed. Who could that person be? Can it be the local U.S. attorney; can it be the special agent in charge of a field office?

If the answer to that question is yes, then how does that affect Mr. Michel's argument about the Attorney General's desire to create uniformity in using the investigative demand?

Mr. HOTIS. The answer is yes. But I am sure that before the Attorney General decides at what level he will allow the decision to be

made, he will take into account the need for uniformity and close compliance with the rules. So that the judgment might just be that he will not want to allow a large number of people throughout the country to make those judgments. I cannot say at this time.

Mr. MICHEL. I would like to add both in response to your question and the prior question by Chairman Edwards that the level of the official making the decision would be one way to guarantee that there will not be some kind of bias or lack of sensitivity or high risk or anything of that sort.

As to uniformity, the difference between potentially hundreds of different magistrates in hundreds of different cities, and some limited number of Justice Department or Bureau officials, is simply put; the magistrates are totally independent one of the other and do not even know what the magistrate in the next State is doing. Whether the number of officials in the Justice Department making these decisions were one, two, whatever the number, they all work for the same man and are in a position to be informed of what the others are doing and in the position to have their work reviewed and compared with what each of the other decisionmakers are doing. That is not the case with magistrates.

So I think there would be very high uniformity and it would not matter what the number of decisionmaking officials were.

Ms. LEROY. You have emphasized in your discussion the need for the investigative demand in fugitive cases. Your emphasis on them leads me to believe that perhaps Mr. Plessner's suggestion about focusing in on specific crimes might be a solution here.

Would you comment on his suggestion?

Mr. HORIS. I am hard pressed to know what crimes you would want to rule out.

Ms. LEROY. What crimes would you want to leave in?

Mr. HORIS. Well, we are primarily interested in our high priority crime areas, such as organized crime, white collar crime, racketeering activity, political corruption; those are the most urgent needs. But as the fugitive case points out, there can be very serious criminal activity that covers the whole range of the Federal Criminal Code, where there is a compelling public interest in enforcing those laws, and there can be very substantial penalties meted out. So it seems that applying this authority sort of piecemeal as the national interests may appear at any given time is really not the best approach.

Right now Mr. Plessner thinks computer crimes are an area of special concern. I do not know what the area of special concern will be 5 or 10 years from now. Will it be necessary for Congress to come back and say, "This is an area of concern, we would like to add this, delete another one?"

It seems to me that is not a very good approach to deal with this problem.

Mr. MICHEL. It is important to remember in terms of the breadth or the need for access in different types of cases or the enforcement of different sections of title 18, that the investigative demand essentially is intended to replace, for certain kinds of records, the prior practice of informal access.

I know personally of cases involving an amazing variety of statutes where information, even violent crimes like bank robbery, to investigate the case successfully, you would need access to records. We used to be able to get it informally. We cannot now.

If that gap is not filled, we are going to be in a substantially worse position with regard to investigating successfully and bringing perpetrators before the courts than we were before. It really runs the gamut. It is not limited to high-priority areas identified by the Attorney General and Director Webster and enumerated by Mr. Hotis.

I also think that one thing Mr. Plessner said seems to me to not quite be true. He seemed to make the assertion that it was suspect that there should be a presumption against the power being general and that there should be a presumption that the power should only apply to one segment or another, or one statute or another, within the fairly broad-ranging jurisdiction of the FBI.

Then he said, I thought, that by way of comparison the IRS and the SEC's roughly analogous administrative summons power was limited. Maybe I am not totally the best witness on this, but my understanding is that the summons power of IRS and SEC is not limited to one small part of their jurisdiction but runs the gamut of their enforcement responsibilities.

It does not seem to me that that is suspicious either in the case of FBI, IRS, or SEC. It needs the power for all parts of its job, except for any part where you can say clearly records are never relevant. I know of no such statute.

Mr. HOTIS. I think it would be inaccurate to perceive this provision as simply an attempt to reach out and give the FBI additional investigative authority. When we drafted the charter we tried to approach the drafting process with the idea in mind of considering not only law enforcement needs, but individual rights and making a proper balance. It seems to me this is one area where that has been done.

There are situations where we can obtain some of these records informally. What we have tried to do is to insure that there are formalized procedures for access to these records at all times so that we will not have an agent in one part of the country obtaining a record because he knows an individual, and in another part of the country another agent having to go through a grand jury to get a subpoena.

What it does is create a statutory right of privacy that does not now exist in law. Since it does parallel the Financial Privacy Act, one might almost title this particular section "privacy of third party records." We attempted to meet both of these concerns in drafting this provision.

Ms. LEROY. Is it your intention to have the custodian of the records be able to turn over the records during the initial 10-day notice period, before the customer actually receives notice? The charter is not really clear about that.

For example, the Right to Financial Privacy Act prohibits the custodian from turning over those records during the period that the notice is being sent to the subject of the records.

Mr. MICHEL. The answer is, No. We certainly do not intend to make the notice a nullity by scooping up the records immediately after issuing it. The intention is to treat it the same way as the act does, that you give the opportunity to the customer who has been notified to make a challenge if he is going to. Then he makes the challenge and you litigate it, or he does not make the challenge and you get the records.

Ms. LEROY. Do you think that is a drafting problem?

Mr. MICHEL. I do not think it is a drafting problem.

Ms. LEROY. Well, it isn't very clear to me.

Mr. MICHEL. I do not think it is a drafting problem because what is important is what you tell the bank. You make it clear to the bank that the demand that they have just been served with does not ripen until the next stage. That is the important thing to do. It is not necessary for the charter to have a lot of language about that. It is a letter that goes to the bank with the demand—they need to have very explicit language.

Mr. HOTIS. We could certainly clarify that for the record if you think that is necessary.

Ms. LEROY. I have no further questions.

Mr. BOYD. Thank you, Mr. Chairman.

Mr. Michel, in light of Mr. Volkmer's questions before the last break and our discussion this morning about the purposes of the investigative demand, is it fair to say that it is principally designed to protect third party custodians who are otherwise inclined to assist the Bureau with information?

Mr. MICHEL. Well, our contemplation, expectation, and experience all suggest that officials of banks and other institutions are not trying to obstruct criminal investigations or slow them down or in any way impede the work of the FBI in catching criminals and promoting public safety. In most cases the institution would be perfectly willing to supply the records, provided that there is some kind of formal process. So our expectation is that we are not dealing with people who are going to resist but people who simply, for reasons of possible liability, good customer relations, and other considerations, would like to have a formal process. And I think that it meets their needs as well as the FBI's needs to have a kind of formal process that ends the kind of practice that we relied on in the past, which was not as desirable from anybody's standpoint.

Mr. BOYD. Are you familiar with the proposed White House legislation to which Mr. Plessner referred on pages 4 and 5 of his statement in which he indicated it would be aimed at the insurance credit banking industry?

Mr. MICHEL. I am generally familiar with the main features of the legislation. I have not studied each part of it closely.

Mr. BOYD. To the best of your knowledge, how does this compare with the provisions which we have discussed today?

Mr. MICHEL. I would say it is not comparable at all because it is addressed to the private institutions, not to the Government agencies seeking access.

Mr. BOYD. Thank you.

I have no further questions, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Boyd.

I think that people's problems with the in-house postponement decisionmaking is that there is no history, no statistics on it; that is one of the problems.

For example, just take Louisville, Ky., the FBI office there, what percent of the investigations—you cannot answer this I know—but I wonder what percent of the new investigations, and these are also going to be new investigations, would the agent feel that a postponement of advice to the subject be necessary? I think most agents would do it in 100 percent of the cases. They do not want the subjects knowing that they are over there getting information from the banks.

Would you not say it would be very high?

Mr. MULLEN. Just going off the top of my head, Congressman, I would not say it would be almost 100 percent. In our high priority investigations, white collar crime, organized crime, public corruption, the subjects are well aware that they are under investigation.

It is interesting that you mentioned Louisville because we do have several high priority investigations underway involving public figures, banking officials and others, and we are able in these cases to proceed with the grand jury subpoena because the grand jury has the matter under investigation. But I would not think it would be close to 100. I would go somewhere between 40 and 50 percent as a rough estimate, but that is off the top of my head.

Mr. EDWARDS. All cases where the subject did not already know of the investigation perhaps, but most of the new cases where the subject was not advised where he or she was under investigation?

Mr. MICHEL. I would like to answer your question by using the same language that you employed.

I thought you said at least that wouldn't agents in 100 percent of the cases prefer not to have the subject of the investigation notified? I think the answer, taking your language quite literally in terms of preference, probably would be yes. But of course the statute does not leave it up to the preference of the agent; it says, in effect, if you can prove with facts that witnesses will be tampered with, there is a likelihood of flight and those other things, if you can show facts that demonstrate that likelihood, then notice can be delayed. And if you can't, it can't.

So it is not the preference of the agent or a general attitude, it is a question of facts on the case-by-case basis. I think in doing that the charter sets up a fairly rigid, though realistic, standard and test.

Mr. EDWARDS. I accept that.

Now the Organized Crime Control Act of 1970 contained subpoena power for investigations in racketeering which in some ways establishes requirements that are stricter than the ones you are seeking to establish in this charter.

For example, it provides for a racketeer document custodian to maintain control of documents collected under such subpoenas and to assure that they are not transferred without consent of the office from which they were subpoenaed and provides for return of the records upon completion of the investigation or case.

Now one of the witnesses yesterday, a member of the Assassinations Committee, Mr. McKinney, expressed alarm at the looseness of the law controlling the transmittal and dissemination of the information that the FBI collects under these subpoenas. He says that in the Assassinations investigations the members of the committee were alarmed at the flowing of paper, to almost use his words, from one agency to another of private information—it was just Government-wide—not only to other Federal agencies but to State and local agencies.

Where are the controls in here about dissemination of this information to State and local agencies and to other Federal agencies?

Mr. MICHEL. Congressman, I think that in a way your question highlights an area of development and evolution over a period of 15 years in which I think great progress has been made. As the newcomer, maybe, to this group, it is perhaps not inappropriate for me to be the one to observe that it is through efforts of people like yourself and other

Members of Congress, and indeed Mr. Hotis and the executive branch and the FBI that there are far more systematic and regular procedures on all these now than there were then.

The time that the Assassination Committee was focusing on was the timeframe of the early and mid-1960's. The timeframe of the RICO investigative demand of course in 1970. And the timeframe we are talking about of course is nearly in the 1980's.

The charter did not contain a lot of detailed provisions which were put in the Organized Crime Control Act because in the interim we developed the concept and practice of attorney general guidelines. It is much more appropriate in our view for those kinds of detailed procedures to be put in guidelines, consistent with what Attorney General Levi did and his successors have continued. That is the only reason why something was put in that is detailed in the 1970 act but was not put in the charter. We leave that to the guidelines.

As far as the general circumstance is concerned of information sharing, I think not only are the procedures much more rigid, the practices and procedures much more rigid now than they have been in any prior period or periods, but that the guidelines process provides the best way to make sure that those procedures reflect the wisdom of outside groups as well as the wisdom and experience of Bureau and Justice Department officials.

Mr. EDWARDS. Counsel?

Ms. LEROY. I just have one or two more questions.

First of all, is it your intention that the civil remedies provision of the Right to Financial Privacy Act apply to those records that are covered by the Right to Financial Privacy Act in the charter?

Mr. HOTIS. Yes; it is. We did not intend to change any of the provisions of the Financial Privacy Act at all.

Ms. LEROY. Can I ask then why there are no similar provisions for the other records that are described in the investigative demand provisions?

Mr. HOTIS. We do not have any remedies at all in the charter, as you well know. That raises an enormous issue that I am not fully prepared to discuss at this time. But the fact that there are remedies in the violation of the Privacy Act, it seems to me, is not a total argument for having those same remedies here with regard to access to these particular records.

In addition, although we fully support the principles of the Financial Privacy Act, I must say that we do have some concerns about some provisions of that act. So I would not want to take it as an ideal model for all legislation in the future.

Mr. MICHEL. Can I go back before it slips my mind again to answer the second part of the chairman's question which I neglected to answer.

Mr. Chairman, you referred to, among other points, the notion that the 1970 Organized Crime Control Act had higher standards than the charter for the issuance of compulsory process for records.

I would suggest to the committee that actually the standards in the charter are higher, and it is easy to lose sight of this, because we can only issue an investigative demand for records if we have a properly authorized criminal investigation under an earlier section. That earlier section contains, I think, a significant study when it requires "facts or circumstances that reasonably indicate a crime." As I recall it, the Organized Crime Control Act does not have as stringent a hurdle that you have to get over to start the investigation.

Therefore, considering that initial hurdle that has to be overcome, I would suggest that there is a higher standard in the charter that has to be met before compulsory process issues than is the case either in the ordinary grand jury investigation or in terms of the civil investigative demand provided for in the Organized Crime Control Act of 1970.

Mr. EDWARDS. I believe, though, that any postponement goes to a Federal district judge. Is that correct?

Mr. MICHEL. I do not recall.

Mr. EDWARDS. Counsel?

Ms. LEROY. You seem to have been suggesting that the Bureau would have the authority to continue using the investigative demand even after a grand jury had been impaneled. Is that correct?

Mr. HOTIS. That is correct.

Ms. LEROY. How does that fact reflect on your argument that you need the investigative demand primarily for investigations that have not reached the point where you have sufficient evidence to go to a grand jury?

Mr. HOTIS. If the matter is before a grand jury, the investigative needs would be carefully coordinated with the U.S. attorney. Where the needs can be met through a grand jury, we would use it. If there are, however, some special needs that would not be satisfied by that procedure, we would use the investigative demand. The mere fact that the matter is before a grand jury would not preclude us from relying on this particular provision.

Mr. MICHEL. I think it is likely—and it is a matter that requires further study and thought in drafting of guidelines—that we will come to a view that, except for relatively rare circumstances, once a specific investigation is in the grand jury and grand jury subpoenas are being issued for records, that we would not ordinarily also be using the demand process. That is much more likely to be used extensively in pre-grand-jury circumstances and very little during jury proceedings.

But it is quite true, as Mr. Hotis says and your question implies, that the charter does not preclude use later than the pre-grand-jury stage on its face.

Ms. LEROY. I have no further questions.

Mr. EDWARDS. Well, this has been a very useful hearing today and we thank our witnesses from the Bureau and from the Department of Justice for being here. I think we did point up in the discussion of today and yesterday that there are several areas that have to be clarified. I would hope you would think about, would be whether or not the crimes should be identified and this particular procedure, this subpoena procedure, limited to major areas or certain areas where you have problems. Now there is a lot of title 18 that perhaps would not apply to. I can think of one, detainment of a Government pigeon which is one, and quite a number of others.

Second, of course, it bothers a lot of people that the postponement decision is made in-house. I am sure we are going to have to think about that some more and you are too.

Thank you very much for good testimony.

Mr. HOTIS. Thank you, Mr. Chairman.

Mr. MICHEL. Thank you.

Mr. EDWARDS. The subcommittee will now adjourn.

[Whereupon, at 11:55 a.m., the subcommittee adjourned.]



# LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, NOVEMBER 8, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 2:35, p.m., in room 2226, of the Rayburn House Office Building, the Honorable Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, and Volkmer.

Staff present: Catherine LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. Will the subcommittee come to order?

The prepared testimony of our witnesses today focuses on the vital, but sometimes strained relationship between local police departments and the FBI. The FBI Charter must insure that cooperation and mutual assistance, rather than interference and jurisdictional disputes are encouraged; and I am grateful for the useful suggestions of the Police Foundation on this issue.

One of our witnesses today, Patrick Murphy, is also an acknowledged expert on the subject of internal control of law enforcement personnel. As commissioner of police of the city of New York, Mr. Murphy learned first hand of the value and shortcomings of this method of accountability. While local police activities vary from FBI responsibilities in a number of respects, the similarities are also significant. It is important to note, for example, that in New York City today, guidelines are being formulated that are remarkably similar in scope and subject to the charter. Furthermore, in some respects, the impetus for this movement was derived from similar allegations of abuse in intelligence activities.

Thus, I believe that the police experience with internal discipline and control can provide very useful instruction for us on the subject of the FBI Charter. It may be that the failures in police control provide the most important lesson.

Our witness this afternoon is Patrick Murphy, currently director of the Police Foundation. Mr. Murphy has served as commissioner of the New York City Police Department and head of the police department here in Washington. The concept of regulating law enforcement behavior—policing the police—is not a new one to him and I am sure he will provide this subcommittee with valuable insight.

Mr. Murphy, before asking you to introduce your colleague, I will now yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I, too, welcome Mr. Patrick Murphy. He has been a hero of mine for many, many years. I commend him for his work as president of the Police Foundation. Mr. Murphy, I read your very excellent testimony with the greatest interest and profit.

It touches upon a subject that is also within my jurisdiction; namely, the reshaping of the criminal code. We are seeking in that document to do precisely what you say on page 6, namely get a sense of federalism which is the foundation of this Nation's Government.

I welcome also your colleague, Mr. Gary Hayes. I know of Mr. Hayes' work in Boston and Massachusetts. He's a part of the perennial "brain drain" that goes on in the Commonwealth of Massachusetts. I know you are going to make a very great contribution this afternoon.

It may be I have to leave before the conclusion of the hearing. Let me add, Mr. Chairman, that a further difficulty right now is that the State Department in the person of Warren Christopher is briefing all of the Members about Iran. That's another reason perhaps why some of the Members weren't able to be here at this time.

Thank you very much for coming. I yield back the balance of my time.

Mr. EDWARDS. Thank you, Mr. Drinan. You have my proxy for the meeting with Mr. Christopher. Again, welcome, Mr. Murphy, Mr. Hayes. Welcome. You may proceed.

**TESTIMONY OF PATRICK MURPHY, PRESIDENT, POLICE FOUNDATION, WASHINGTON, D.C. AND GARY P. HAYES, EXECUTIVE DIRECTOR, POLICE EXECUTIVE RESEARCH FORUM**

Mr. MURPHY. I have submitted a prepared statement. I would like to mention a few highlights of that statement. I would like to begin by expressing my admiration for the Federal Bureau of Investigation, an agency of the Government that has had very high standards and an outstanding record of performance.

I would like to make a few comments about relationships between the FBI and State and local police agencies.

Certainly from the local police perspective of the FBI, that Bureau is the pinnacle of police professionalism. It has college graduates, high standards of performance and integrity, and deals with the kinds of crime problems that police officers rarely deal with. Police officers on the street deal with neighborhood brawls, petty thievery, teenage vandalism, vice, burglary, and street crime. So the American police have a high regard for the FBI and look up to it.

On the other hand, during the reign of J. Edgar Hoover, relationships weren't always as positive as they might be. Often the police felt the Bureau behaved in a dominating fashion and was not beyond gaining publicity for an important case when the police had done much of the work. There were vast improvements and healthier relationships after Clarence Kelley became Director of the FBI; now under William Webster, I think further improvement is occurring.

It's important for us to be aware that our local police system is fragmented into more than 17,000 agencies and thus is hindered from developing the knowledge, skills, sophistication, and organizational and management capacity needed to meet its challenge and

responsibilities without the support and technical assistance of the Federal Government and its premiere law enforcement agency.

That is a point I would like to stress: that our local, fragmented police system desperately needs the assistance of the Federal Government in the form of law enforcement assistance and the active day-to-day cooperation and backup support of the Federal Bureau of Investigation as well as some other Federal agencies.

None of what I say is to suggest that police departments have not improved since Federal support was accelerated with the establishment of the Law Enforcement Assistance Administration. To the contrary, the police have made major improvement during the past 15 or so years. These improvements have been a fraction of those which an even more appropriate level of Federal support, not only from LEAA but also from the FBI, can provide in the future.

The FBI provides fingerprint and record services, training and laboratory services, organized and white collar crime enforcement, fugitive investigations and apprehensions, kidnapping investigations, exchange of criminal intelligence information, and investigation of civil rights violations and corruption by the police.

I think the FBI is to be commended for its increasing role in these important areas.

Of course, another important service of the FBI is to be the ideal for the Nation of a professional law enforcement organization. From this perspective the inadequacy of American police service in coping with the Nation's high crime rate can be interpreted as a reflection of the large gap between the standards of the FBI and those of even the best municipal police departments. In sum, the FBI has standards of accomplishment which the rest of law enforcement should try to emulate.

To help local police in moving down the road toward professionalism, the role of the FBI must be one of cooperation and assistance.

The Bureau must meticulously avoid attempting to control or dominate the local police, both to assure that some of the abuses of the past do not recur and to guard against any impression that Bureau assistance is a prelude to the creation of a national police force.

Accordingly, the charter before this subcommittee for consideration should be changed to require guidelines governing the FBI in its relations with local and State law enforcement. In my view, those guidelines should be developed by the FBI Director, the Attorney General, and an advisory committee or committees made up of representatives of local and State government.

Those representatives should include not only State police directors, police chiefs, sheriffs, but also mayors, city managers, county supervisors, local and State legislators, elected State executives, and others on the local and State level who influence law enforcement.

Local and State appointed officials who do not directly administer law enforcement agencies should be included in an advisory capacity for the creation of guidelines because these officials are directly responsible to citizens for local and State police services.

These officials are in close contact with their constituents. They are able to gage the needs of citizens in terms of policing. They are accountable to their constituents for the control of crime. Their voices should be heard in developing guidelines that determine how best the FBI can help to improve American policing.

My good colleague, Gary Hayes, the executive director of the Police Executive Research Forum, has noted where guidelines are needed to govern specific areas of the proposed charter. For example, there is no requirement for guidelines covering section 535d(4) which would permit the FBI to provide investigative assistance to State and local law enforcement units in criminal investigations when the heads of those agencies request such assistance and the Attorney General finds that this assistance is "necessary and would serve a substantial Federal interest."

This section of the charter is, indeed, sensitive because it opens up the possibility of FBI assistance to local and State law enforcement on occasions when no Federal jurisdiction can be cited. Potentially this section can be very useful to local and State law enforcement, but it does suggest possibilities for abuse if not governed by clear interpretation of the sections' language and by a recognition of the sense of federalism which is the foundation of this Nation's Government.

I can think of no better way to define and guide the use and interpretation of the section than to have representatives of local and State governments work with the FBI and the Attorney General's office to develop guidelines as to the interpretation and implementation of the section.

Before concluding my testimony I want to comment on another area relating to the proposed charter which I know interests this committee.

I refer to the issue of external and internal review of FBI procedures and operations. It has been my experience that the best external review of a law enforcement agency lies with concerned elected officials who are ultimately accountable for the operations of the police agency. For example, when a mayor or city council shows an active and continued interest in the operations of a police agency, that agency invariably follows better procedures and operations, is more responsive to citizens, and is more productive.

As to internal control of a law enforcement agency, there are ways by which established procedures can be enforced in a consistent manner. When guidelines for behavior and operations in a particular area are accompanied by a clear message that those guidelines will be enforced by a high-level administrative review team and that team in turn signals at regular intervals that it is concerned with adherence to the guidelines, those guidelines will be followed.

In New York City, when I was commissioner of police, we adopted a restrictive policy on the use of deadly force; I might add it was a policy very similar to the excellent policy which the FBI itself has had for many, many years.

To assure that the policy was followed, we made certain that each time a police officer discharged his police revolver, that act was reviewed by a high-level team of police officials.

Periodically the team would alter its guidelines slightly. The changes had to be noted at every level in the police department as a way of keeping officers alert to both the guidelines and the internal oversight offered by the administrative team.

I am indicating here that two of the most important elements of any internal system to control misconduct, operational procedures, or any other aspect of law enforcement agencies' practices and personnel are vigilance and clout. Employees of a law enforcement agency at

every level must be aware that instances of suspected misconduct or deviation from established procedures will be reviewed at a high level and that high-level review teams are vigilant in carrying out their responsibilities.

Still another important element is the holding accountable of supervisors at every level for the performance of their personnel.

Thank you very much for this opportunity to testify, Mr. Chairman. (The complete statement follows:)

**STATEMENT OF PATRICK V. MURPHY, PRESIDENT, POLICE FOUNDATION**

Mr. Chairman, I am honored by your invitation to appear before this distinguished subcommittee. The invitation to testify on the proposed FBI charter provides me with an opportunity to discuss an aspect of the Federal Bureau of Investigation which is little discussed and to bring to public scrutiny an aspect of the proposed charter which, to date, has received little notice.

I want to discuss today the relationship between the FBI and state and local law enforcement, particularly the local police, and how that relationship can be enhanced through changes in the proposed charter.

Let me begin this discussion by offering, from the point of view of the local police, two perspectives of the FBI.

One local police perspective of the FBI is that of the Bureau as the pinnacle of police professionalism. Local cops, for the most part in the past and even now, have no college degrees, are stuck in the same community for all their police careers, and spend much of their time dealing with human frailty and violence in the form of family fights, neighborhood brawls, petty thievery, teenage vandalism, two-bit vice, and small-time burglary and street crime. That the police are charged with enforcing the law and keeping order at the curbstone level of American criminal justice, and hence are the most important people in American law enforcement because of their responsibilities, does not sustain a sense of professionalism on the part of local police. To many local cops, whether they will admit it openly or not, the real professionals of American law enforcement, the cream of the field, are those fellows with the clean fingernails and the well-cut suits, the FBI agents who without exception have college educations; who move around from community to community in a career-enhancing progression; who deal with selected crimes well removed from grubby misdemeanors and clumsy felonies. As both the general public and the police have been told for the past fifty-plus years through the workings of a remarkable public relations effort, FBI agents are the stars of American law enforcement. A little confession: in many ways, for example in areas such as levels of education and investigative skills, FBI agents are indeed, as a group, the best we have in American law enforcement. I say this as one who has served as the chief police executive for four cities and who has had as associates thousands of very fine police officers.

Now let me give a second local police perspective of the FBI, one that is most common in the larger police agencies: the FBI, through the reign of J. Edgar Hoover, was an agency which continually sought to control and dominate local police; which sought to undermine efforts to raise educational requirements (as distinct from training levels) for the police; which sought to control, often successfully, the International Association of Chiefs of Police until Quinn Tamm took over that organization in the early 1960's; which sometimes stole the credit at the last moment for successful investigations that were begun, nurtured, and successfully wound up by local police with only marginal, eleventh-hour federal help; which often, through the status and position of special agents in charge, influenced the selection of local police chiefs known to be not only friendly to the FBI, but also deferential to its desires.

When Clarence Kelley, an FBI agent for 20 years but also chief of police of Kansas City, Missouri, for twelve years, became director of the Bureau in 1973, the FBI became more even-handed and collegial in its dealings with local police and that progress has been continued and expanded by the current director, William H. Webster.

But we should not forget history as this charter is considered. The record should show that the FBI for several decades abused, on occasion, its relationship with local policing. The FBI charter thus should be structured to deter any attempts to return to the bad old days. At the same time, the charter should assure that local police can benefit from the best the Bureau has to offer.

And the best the Bureau has to offer is very important to police attempts to deal with an ever more serious crime problem. A locally based, fragmented police service of 17,000 agencies is hindered from developing the knowledge, skills, sophistication, or organizational and management capacity needed to meet its challenging responsibilities without the support and technical assistance of the federal government and its premier law enforcement agency.

This is not to suggest that police departments have not improved since federal support was accelerated with the establishment of the Law Enforcement Assistance Administration. To the contrary, the police have made major improvements during the past 15 or so years. But these improvements have been a fraction of those which an even more appropriate level of federal support, not only from LEAA but also from the FBI, can provide in the future. Federal support for local policing already is fulfilled to a significant degree by the FBI. The Bureau provides fingerprint and record services, training and laboratory services, organized and white collar crime enforcement, fugitive investigations and apprehensions, kidnapping investigations, exchange of criminal intelligence information, and investigation of civil rights violations and corruption by the police.

Beyond these services, as I have indicated, the FBI provides another very important service by being the ideal for this nation of a professional law enforcement organization. From this perspective, the inadequacy of American police service in coping with the nation's high crime rate can be interpreted as a reflection of the large gap between the standards of the FBI and those of even the best municipal police departments. In sum, the FBI has standards of accomplishment which the rest of law enforcement should try to emulate.

To help local policing in moving down the road toward professionalism, the role of the FBI must be one of cooperation and assistance. The Bureau meticulously must avoid attempting to control or dominate the local police both to assure that the abuses of the past do not recur and to guard against any impression that Bureau assistance is a prelude to the creation of a national police force.

Accordingly, the charter before this subcommittee for consideration should be changed to require guidelines governing the FBI in its relations with local and state law enforcement. In my view, those guidelines should be developed by the FBI Director, the Attorney General, and an advisory committee, or committees, made up of representatives of local and state government. Those representatives should include not only state police directors, police chiefs, and sheriffs, but also mayors, city managers, county supervisors, local and state legislators, elected state executives, and others on the local and state level who influence law enforcement.

Local and state elected and appointed officials, who do not directly administer law enforcement agencies, should be included in an advisory capacity for the creation of guidelines because these officials are directly responsible to citizens for local and state police services. These officials are in close contact with their constituents; they are able to gauge the needs and demands of citizens in terms of policing; they are accountable to their constituents for the control of crime; their voices should be heard in developing guidelines that determine how best the FBI can help to improve American policing.

A good colleague, Gary P. Hayes, the Executive Director of the Police Executive Research Forum, has noted where guidelines are needed to govern specific areas of the proposed FBI charter. There are now requirements in the proposed charter for promulgation of guidelines governing several sections. But there are no requirements for guidelines in most sections dealing with relations between the Bureau and local and state law enforcement. These are omissions which should be corrected.

For example, there is no requirement for guidelines covering section 535d(4) which would permit the FBI to provide investigative assistance to state and local law enforcement units in criminal investigations when the heads of those agencies request such assistance and the Attorney General finds that this assistance is "necessary and would serve a substantial federal interest."

This section of the charter is, indeed, sensitive because it opens up the possibility of FBI assistance to local and state law enforcement on occasions when no federal jurisdiction can be cited. Potentially, this section can be very useful to local and state law enforcement, but it does suggest possibilities for abuse if not governed by clear interpretation of the section's language and by a recognition of the sense of federalism which is the foundation of this nation's government.

I can think of no better way to define and guide the use and interpretation of this section than to have representatives of local and state governments work with the FBI and the Attorney General's office in developing guidelines as to the interpretation and implementation of the section.

As noted in testimony prepared by Mr. Hayes, there should be requirements for guidelines covering several other sections of the proposed charter, including sections dealing with training, technical assistance, and research and development. Mr. Hayes' testimony also suggests including in the charter language from the Omnibus Crime Control and Safe Streets Act of 1968. I support including this language.

Mr. Chairman, I believe that an advisory committee, or committees, working to devise guidelines and, perhaps, meeting periodically with representatives of the FBI Director and the Attorney General could be a source of state and local guidance to the implementation of the charter. This guidance could help to prevent any recurrence of past abuses in the relationships between the FBI and local and state government. Equally important, an advisory committee, or committees, could keep the FBI apprised of local needs, thus helping to determine the level and quality of FBI services and where the FBI standards of professionalism could best guide the development of local policing.

The charter before you is likely to be in place for many generations and through the administrations of many FBI directors. One purpose which should guide the final language of this charter is to make certain that the FBI, in a cooperative and collegial way, can make a major federal contribution to the productive functioning of American policing.

Mr. EDWARDS. Thank you very much, Mr. Murphy.

I believe we will have Mr. Hayes testify, and then we can question both of the witnesses. Mr. Hayes is executive director of the Police Executive Research Forum. We welcome you.

Without objection, both of your statements will be made a part of the record.

Mr. HAYES. Thank you. Rather than reading my testimony, which you have, I will try to summarize it as briefly as I can so that we can get immediately into the questions.

First, let me thank you on behalf of the 60 members that I represent. Those 60 members come from some of the Nation's largest cities and we welcome this opportunity to be able to comment on the proposed charter.

Mr. EDWARDS. What do you mean by 60 members?

Mr. HAYES. We have 60 police chiefs who are members in our organization. They are chosen from the largest cities. The requirements for membership are that the chief come from a jurisdiction of at least 100,000 and that he have a college degree and represent the principles of our organization which are one, a belief in the use of research in management decisions and two, which is very appropriate for this committee, the belief in open debate of issues crucial to American criminal justice; differences of opinion are welcome.

Mr. EDWARDS. How are you financed, Mr. Hayes?

Mr. HAYES. We are financed through dues, through Federal research grants, and from basic support money from the Police Foundation and other foundations.

Mr. EDWARDS. Thank you.

Mr. HAYES. As I say, we welcome this opportunity to comment on the charter. We agree with Director Webster who declared in testimony that the FBI, "urgently needs a clear and workable statement of its responsibilities, power, and duties."

Likewise, we agree with him that the charter should not allow for any future misunderstanding of authority. Our purpose today is to help realize that goal of no future misunderstanding of authority.

One of our basic concerns is that the principle of federalism be recognized throughout the charter. In fact, we suggest the charter contain this language:

Nothing contained in this charter shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement and criminal justice agency or any State or any political subdivision thereof.

We think that language, which is currently in the 1968 Omnibus Crime Control and Safe Streets Act, clearly and concisely acknowledges that principle of federalism. Contained in the charter, this language would leave no misunderstanding as to the role of the FBI in its relationships with local law enforcement agencies.

We also believe that guidelines should be included that would affect several sections of the charter. These guidelines should be developed with the advice of local law enforcement officials as well as a cross section of other local officials, such as mayors, city managers, and others who have an interest in local law enforcement.

Although there are some sections in the FBI Charter which require guidelines, there are other sections which now do not require guidelines and should do so. One of those sections is, as Mr. Murphy pointed out, 535d(4) which states that the FBI may:

Provide investigative assistance to other Federal, State, or local law enforcement agencies in criminal investigations when requested by the heads of such agencies if the Attorney General or his designee finds that such assistance is necessary and would serve a substantial Federal interest.

We believe that this clause is sufficiently vague that it requires guidelines to spell out exactly when Federal and FBI assistance could be provided. As it now stands, it could be interpreted too broadly; it could be interpreted too restrictively; or it could be interpreted inconsistently.

We also believe that guidelines should be drafted for section 536(1) of the charter which deals with education and training of police. Guidelines as to when education will be provided and how it will be provided would be most useful.

Guidelines that we request for the section concerning education and training should reflect language that is currently in section 402(b)(6) of the Omnibus Crime Control and Safe Streets Act which states—and again reaffirms the principle of federalism—that training “shall be designed to supplement and improve rather than supplant the training activities of the State and units of general local government \* \* \*”

We believe that this principle is so important that it should be again stated in the charter.

We wonder why language that is currently in section 404 of the Crime Control Act has been dropped. That language says that FBI training be “at the request of a State or unit of local government.”

We would like to see that language reinserted.

Likewise, we request that guidelines be established for sections 536b and 536d of the proposed charter. It would be useful if guidelines were spelled out when FBI assistance could be provided.

We are concerned that language in section 536(2) could be interpreted as giving the FBI authority to do more than sponsor research and development for its own authorized law enforcement functions, which research and development also may benefit local law enforcement.

The LEAA is the Federal agency which provides assistance for criminal justice and law enforcement research. The forum believes that the LEAA should remain the major source of support for research in

these areas. Thus, the forum suggests that section 536(2) be changed to state clearly that the FBI is authorized to conduct or contract for research and development solely to improve and strengthen its own authorized law enforcement functions.

Before concluding my testimony, I want to note that this Nation faces an increasingly grave crime problem, one which taxes the abilities and resources of police and other law enforcement units at every level of government: street crime, white collar crime, violence in the home and in the neighborhoods, crimes associated with drugs are threatening to tear apart the fabric of national life.

To meet the challenge of crime, every unit of policing and law enforcement must work together. There must be partnership in the Nation's effort to control crime.

Throughout its history, the Federal Bureau of Investigation has made major contributions to American law enforcement. The requirements of education and investigative skill which the FBI demands of its agents have set standards of accomplishment for all other units of law enforcement. The rest of American law enforcement appreciates and needs the FBI.

But, for the FBI to play a leadership role in American law enforcement and to work most productively in helping to meet the challenge of crime, the relationship between the FBI and State and local law enforcement must be one of equals cooperating in the spirit of the American Federal system.

American policing has progressed markedly during the past 15 years. Some of this progress has come as the result of internal changes and innovations; some of the progress has been the result of contributions made by the FBI, LEAA, and private sources. American policing now has progressed to the point that it can only have a relationship of equals with all other law enforcement units.

We of the Police Executive Research Forum thank you for this opportunity to testify.

[The complete statement follows:]

STATEMENT OF GARY P. HAYES, EXECUTIVE DIRECTOR, POLICE EXECUTIVE  
RESEARCH FORUM

We of the Police Executive Research Forum welcome this opportunity to comment on the proposed FBI charter. We agree with Director William Webster who has declared that "the FBI urgently needs a clear and workable statement of its responsibilities, power, and duties." Director Webster said in testimony last year that such a charter "should be one that does not allow for any future misunderstanding of authority." The forum's purpose today is to help realize the goal of no "future misunderstanding of authority."

Our specific concern is to make certain that the charter ensures that the FBI and local law enforcement are able to work in a cooperative way and that neither side dominates or controls the other. First of all, the forum believes that the following language should be included in the charter as a general guiding principle:

"Nothing contained in this charter shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement and criminal justice agency of any State or any political subdivision thereof."

At present this language is not in the charter, although the same language can be found in the 1968 Omnibus Crime Control and Safe Streets Act. That act pertains mostly to the Law Enforcement Assistance Administration, but it does govern provisions regarding the FBI's role in training and research. The forum membership believes that the language belongs in the charter so that there can be no question that the well-established principle of local control of American policing is clearly spelled out and given the prominence and emphasis this principle deserves.

Now let me mention several areas in the proposed charter where we believe the document could be improved to ensure an equitable relationship between the FBI and local law enforcement. In most instances, improvement means only adding requirements for guidelines which should be developed by the Attorney General and the Director of the FBI working in concert with advisory committees made up of local government officials.

Section 535(4) says that the FBI may "provide investigative assistance to other Federal, State, or local law enforcement agencies in criminal investigations when requested by the heads of such agencies if the attorney General or his designee finds that such assistance is necessary and would serve a substantial Federal interest."

Currently, there is no requirement in the proposed charter, as there are in some other sections, for the promulgation of guidelines governing this section. But this section, relying for action as it does on such phrases as "when such assistance is necessary" and "substantial Federal interest," could be subjected to a variety of interpretations. If interpreted too broadly, the section could leave police administrators subject to political pressures to call for FBI help in cases of a locally sensational or sensitive nature when FBI intervention would be inappropriate. If interpreted too restrictively, this section could preclude help when it is genuinely needed by local law enforcement. If interpreted inconsistently, this section could be unfair to some units of local government.

The forum recommends that the section be amended to include a requirement that guidelines be prepared spelling out in detail when the FBI may provide investigative assistance to local law enforcement agencies, to define "when such assistance is necessary" and "a substantial Federal interest," and to specify what assistance entails.

As with guidelines that we will suggest be required in other sections of the charter, these guidelines should be prepared by the Attorney General, the Director of the FBI, and a representative cross section of local and state government. This cross section could take the form of an advisory committee made up of police chiefs, and sheriffs, mayors, managers, council members and county supervisors, state police directors, and elected state officials and legislators. Such guidelines then would reflect views flowing not only from what federal officials deem appropriate, but also from what local and state officials believe are necessary.

Guidelines reflecting the views of state and local government should be required also for section 536(1) of the charter which deals with education and training. That section authorizes the FBI to "establish, conduct, or assist in conducting programs to provide education and training for its employees and for law enforcement and criminal justice personnel of other Federal agencies, State, or local agencies, and foreign governments and members of the Armed Forces of the United States."

Section 402(b)(6) of the Omnibus Crime Control and Safe Streets Act provides that LEAA assistance in the training of local enforcement and criminal justice personnel "shall be designed to supplement and improve rather than supplant the training activities of the State and units of general local government. . . ." The proposed charter does not contain such language restricting the Bureau in specific training functions as it does LEAA, another federal agency. We believe that section 536(1) should be amended to include this language and language omitted in the proposed charter that governs FBI training efforts in the Omnibus Crime Control and Safe Streets Act. Section 404 of the Crime Control Act authorizes that FBI training be "at the request of a State or unit of local government."

Section 536b of the proposed charter gives the FBI authority to provide technical assistance to, among others, state and local law enforcement. Again, the forum believes that guidelines should be developed cooperatively by the Attorney General, the Director of the FBI, and an advisory committee of state and local government so that local government has a full voice in determining aspects of this assistance. Similarly, and equally important, guidelines developed with the contributions of local and state government should be required for 536d, which deals with "identification, criminal histories, and other records; exchange for criminal justice purposes."

Another section requiring clarification is 536(2). This section authorizes the FBI to "conduct or contract for research and development of new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and criminal justice and to procure such systems, equipment, necessary information and material, including technical systems and devices for its authorized law enforcement functions under sections 533, 533b, 533c, 534, and 535c of this chapter."

The language in 536(2) could be interpreted as giving the FBI authority to do more than sponsor research and development for its own authorized law enforcement functions, which research and development also may benefit local law enforcement. The LEAA is the federal agency which provides assistance for criminal justice and law enforcement research, and the forum believes that the LEAA should remain the major source of support for federal research in these areas. Thus, the forum suggests that section 536(2) be changed to state clearly that the FBI is authorized to conduct or contract for research and development solely to improve and strengthen its own authorized law enforcement functions.

Before concluding my testimony, I want to note that this nation faces an increasingly grave crime problem, one which taxes the abilities and resources of police and other law enforcement units at every level of government. Street crime, white collar crime, violence in the home and in neighborhoods, crimes associated with drugs, are threatening to tear apart the fabric of national life.

To meet the challenge of crime, every unit of policing and law enforcement must work together. There must be partnership in the nation's effort to control crime.

Throughout its history, the Federal Bureau of Investigation has made major contributions to American law enforcement. The requirements of education and investigative skills which the FBI demands of its agents have set standards of accomplishment for all other units of law enforcement. The rest of American law enforcement appreciates and needs the FBI.

But, for the FBI to play a leadership role in American law enforcement and to work most productively in helping to meet the challenge of crime, the relationship between the FBI and state and local law enforcement must be one of equals cooperating in the spirit of the American federal system.

American policing has progressed markedly during the past 15 years. Some of this progress has come as the result of internal changes and innovations; some of the progress has been the result of contributions made by the FBI, LEAA, and private sources. American policing now has progressed to the point that it can only have a relationship of equals with all other law enforcement units.

We of the Police Executive Research Forum thank you for this opportunity to testify.

The Police Executive Research Forum is an organization of 60 chief executives of the nation's larger police agencies and a group of associate members drawn from police departments, higher education, and other areas of the criminal justice system. The Forum's goal is to improve the delivery of police services through the professionalization of police executives and officers and by the development of new knowledge through research and experimentation. The Forum encourages thoughtful, open debate on all criminal justice issues as a way of furthering the process of professionalization. Membership in the Forum is limited to the leaders of the nation's largest police departments—those which have at least two hundred members or are the principal police agencies for a jurisdiction of at least one hundred thousand persons.

Gary P. Hayes, Executive Director of the Police Executive Research Forum, served as assistant to the commissioner of the Boston Police Department from 1972 to 1976. He has a law degree from the University of Wisconsin Law School, a master's in police administration from Washington State University, and a bachelor's in political science from The Pennsylvania State University.

Mr. EDWARDS. Thank you very much, Mr. Hayes.

You both stress that there should be more precise guidelines in the subject of the FBI's relationship with State and local law enforcement agencies. You must mean by that that there is something not going too well or something unsatisfactory about that relationship. Otherwise, why would you insist on there being strict guidelines and more guidelines in the charter?

Mr. MURPHY. Mr. Chairman, without a doubt, there have been very important improvements in recent years in relationships between the FBI and local police departments. I have been in policing long enough to remember some of the tensions in earlier times when many people in policing felt there was a one-way street as far as exchange of information, for example. Because the FBI's jurisdiction was such, the Bureau had flexibility about coming into cases or not coming into cases. Often there was resentment that the FBI might get unwarranted credit for solving major cases.

Under Director Kelley and under Director Webster, I have seen a great improvement. The FBI has been providing outstanding training in recent years which is a great improvement; but as Mr. Hayes pointed out in his testimony, a very sensitive issue would be that of when the FBI would come in to assist a police department, what kind of a case would it be, under what criteria would the FBI come in?

There could be concern on the part of a local police chief that he might look inadequate if it's necessary for the FBI to come in and solve what he thinks of as his case.

At the same time, valuable assistance from the FBI can be of great importance. I think it would be most helpful to spell out that assistance more clearly than the language of the charter now proposes.

Mr. EDWARDS. How does it work now with local police and FBI? When do they step into a case? When does the FBI offer assistance, both when it's wanted and not wanted? There must be more to it.

Mr. MURPHY. In the current bill, there is a provision which would give, as I interpret it, additional authority which the Bureau has not had in the past; that authority is to provide assistance in those cases where, under current practice, there is no Federal jurisdiction.

Under the provision of the charter, the FBI could be brought in. I think that's an extremely sensitive issue. I see that as a new authority.

Mr. EDWARDS. I think you are talking about an increase in jurisdiction, Federal jurisdiction in what has primarily been an area of local police responsibility?

Mr. MURPHY. Yes.

Mr. EDWARDS. Are you talking about civil disturbances? Are you also talking about terrorism?

Mr. HAYES. That's what is undefined in this area. "Substantial Federal interests" and "when necessary." It could be interpreted to mean whatever the person that is interpreting that section wants it to mean. We believe guidelines would be very useful to define what is meant by substantial Federal interest.

Mr. EDWARDS. Well, the problem with having guidelines interpreting Federal law is that guidelines can be changed by the Attorney General where Federal law can only be changed by Congress with the signature of the President. I have some problems with that. Why wouldn't the law just make it very clear as to what the elements of the criminal activity must be before there can be Federal involvement in terrorism or civil disturbances?

Mr. HAYES. Guidelines of when Federal assistance is needed in criminal investigations would be more flexible than laws and would allow changes as needed. For example, in the *Chouchilla* case, Federal assistance was requested and deemed necessary but under current requirements there had to be some searching for Federal jurisdiction to authorize FBI assistance. The Attorney General, with local officials' advice, could promulgate guidelines which authorize Federal investigative assistance in these types of cases. However, if sometime in the future such guidelines were considered too broad, they could be revised without the need for invoking the legislative process. For example, if guidelines were interpreted by FBI agents to allow Federal investigative assistance in a Son-of-Sam type case, and such intervention was considered inappropriate by the Attorney General, the guidelines could be made more restrictive.

Let me also respond to an earlier question about the need for guidelines in relation to current FBI—local police relations. In the past, there have been problems in this area, but relations are improving. Our concern is more for the future. We are establishing, for the first time, a charter which will dictate and guide the future activity of the FBI. We should not mandate broad or vague authority because this potentially could be extended to areas currently not envisioned. While this may not be a problem under the direction of the current Attorney General and FBI Director, we are concerned about future Attorneys General and Directors whom we don't know. Guidelines which are clear and specific will avoid problems in the future and will assure that problems of the past do not repeat themselves.

Mr. EDWARDS. Well, I appreciate that. I accept that.

Where investigations regarding possible civil disturbances are involved, does not the charter leave the criminal standard which, in the first part of the charter, is stated as the bulwark of the Federal responsibility?

Mr. HAYES. Under the civil disturbance section?

Mr. EDWARDS. Yes. Where is the criminal standard in the civil disturbances section?

Mr. HAYES. There is no strict criminal standard, but the Federal Bureau of Investigation involvement in local disturbances suggests the potential of some future Federal assistance.

Mr. EDWARDS. It's your belief that the criminal standard should be adhered to by all law enforcement agencies?

Mr. HAYES. Yes.

Mr. EDWARDS. You say here on page 4 that section 402(b)(6) of the Omnibus Crime Control and Safe Streets Act provides that—

LEAA assistance in the training of local enforcement and criminal justice personnel "shall be designed to supplement and improve rather than supplant the training activities of the State and units of general local government . . ."

Then you say the charter doesn't restrict the Bureau in the same way. Are you saying by that that some of the training activities of the Bureau of State and local police just supplants training back home or does practically all of it supplement and improve the training they get back home?

Mr. HAYES. Again our concern would be with the way the language is written that it could supplant. If that language were not included, there is a potential that it could supplant. I would say now most of their training does supplement.

Mr. EDWARDS. Ms. LeRoy?

Ms. LEROY. The guidelines you call for in your testimony with respect to the relationship between State and local and the FBI call for participation of advisory committees made up of a fairly broad spectrum of State and local government officials. Do you think the other guidelines already mandated by the charter should also have such participation?

For example, there are guidelines required in the section involving civil disorder, I believe; also the use of informants and undercover activities require Attorney General guidelines.

I would if you would be willing to comment on how those guidelines ought to be fashioned, who ought to participate in the process?

Mr. MURPHY. The point I wanted to make in my statement related specifically to relationships between FBI and State and local law enforcement. I did not comment about what is exclusively Federal jurisdiction, a Federal responsibility.

It's in the area of local cooperation that I think the participation of State and local officials is important.

Ms. LEROY. I don't want to belabor this, but does that mean in areas where perhaps State and locals might not feel it's important, but where other Government officials might be involved, or citizens' groups, or other people who may be affected by the jurisdiction of the FBI, should they be allowed to participate in the drafting of those guidelines?

Mr. MURPHY. Well, I wouldn't propose that. I don't propose that. I think the people I identified, for example, mayors, council members, are the people at the local level who have responsibility for police departments; in a sense they are analogous to the Attorney General and the President.

That's why I proposed that in setting guidelines for relationships between Federal and State and local law enforcement, they are very appropriate people. I do not propose citizen members. I propose public officials.

Ms. LEROY. To talk about those guidelines for a minute then, I think the FBI might argue that it's impossible to anticipate every case; for example, in the *Chowchilla* case, there was a lot of pressure on the FBI from outside people to get involved in that case. There is an enormous amount of pressure from Members of Congress to get involved in the *Ku Klux Klan* case in North Carolina.

I think it could be argued that it's impossible to anticipate those situations and impossible to draft guidelines that would cover every one of those cases. I wonder if you would like to respond to that argument?

Mr. MURPHY. It is correct that we can never anticipate all possible situations which may arise; but it is my view—perhaps I didn't make it clear enough in my statement—that under a locally based police system, which is what we have in the United States, it is impossible to have the effective police network that is required, especially when one understands that we have 17,000 police departments in the United States.

It's impossible to have an effective police network in the country without State government and Federal Government accepting certain responsibilities for setting standards, providing records systems and certain kinds of communications systems, providing assistance with training and other functions that no individual police department can provide itself.

So it is in the area of making the Nation's law enforcement effort with local, State, and Federal components, a more viable, active, cooperative entity that I am concerned. Even though we can't anticipate every case that may occur, advisory committees for setting guidelines have a great deal to offer in the way of constantly improving the working relationship between the FBI and local law enforcement.

Ms. LEROY. I would like to ask a couple of questions about training, if I could.

One of the most commonly given reasons for providing Federal training to State and local police is to bring the local police up to a

position where they can assume more responsibility for law enforcement activities in their area. Concurrently, then, the Federal law enforcement agencies can withdraw from certain areas of jurisdiction and concentrate exclusively on uniquely Federal problems, organized crime, for example, particularly in an era when law enforcement money is getting tighter and tighter.

Has this happened either with FBI training or with LEAA-funded training programs? Do you find this kind of improvement in local law enforcement and the subsequent withdrawal, perhaps, of Federal initiative in certain areas?

Mr. MURPHY. I think if we look back over a period of 30 years, there has been tremendous change. When Mr. Hoover created the National Academy of the FBI in the middle thirties, the level of police training in the country was so weak that there was a need to provide a very basic level of training. When I had the good fortune to attend the FBI National Academy in 1957, it was a very valuable experience for me, even though I was a New York City police officer and had the benefit of a training program at a police academy.

Of course, it's a fact that the larger cities did have their own academies then. But getting together for 12 weeks with police officers from other parts of the country was a valuable experience, about the only opportunity that then existed for an exchange of information and ideas.

Now with the LEAA funding of training, increased training by the FBI and State and local agencies, and Federal assistance for college courses, there has been a great upgrading of police training. But I see a continuing need for training that would bring together top management people from across the country. That's one of the most important contributions that the Bureau is making today with the increased number of its seminars for top management.

I think that's a more important service they are performing now than even the basic course of the National Academy. I see the need for a forum for the exchange of information and discussion about very complex problems of police management and administration.

Mr. EDWARDS. Counsel's time has expired. Mr. Volkmer?

Mr. VOLKMER. I must apologize for the fact I wasn't in the room to hear the testimony; but something came up. It's not directly in line with this. I do notice, Mr. Murphy, that you do bring out the fact the FBI is very helpful in the areas of fingerprint record service, exchange of criminal intelligence information, et cetera.

That brings me to one question; this committee does have jurisdiction over it, and we have delved into it. That's NCIC, the question as to whether or not the FBI needs a new piece of equipment. If the chairman would let me go past this charter a minute and ask, What is your opinion on it?

Mr. MURPHY. I must beg off, Congressman. I have not had the opportunity to keep myself as thoroughly informed as I would like to be on that very sensitive issue.

I will say this: The exchange of information provided by the FBI is very, very valuable; but we can immediately find ourselves in a very ticklish discussion about how you weigh privacy against public safety and security.

I know a great debate has gone on for many years about what is the best system for the exchange of information. My view is—and it's not

a very helpful answer—is that we need a good system and law enforcement agencies should be able to exchange information. I know it's a very difficult problem to draw the boundaries about what can be exchanged and how it is exchanged.

Mr. VOLKMER. The other thing I find in reviewing your testimony very hurriedly is that you wish to have more input to the guidelines and the development of guidelines, in such things even as training.

What amazes me is that none of the States want to share any of the expense of those things.

Mr. MURPHY. A lot of police departments do spend a good bit of money on training within their departments.

Mr. VOLKMER. The FBI doesn't really go out and tell them how to train their local people either. They will help, assist with that training. They don't tell how you use this criteria or that criteria.

Mr. MURPHY. No.

Mr. VOLKMER. Should the local police be able to tell the FBI what they should do?

Mr. MURPHY. My view of it, Congressman, is that it's a joint system. Our police departments in this country absolutely cannot operate without the assistance of the Federal Government. There are many services that the Bureau provides that we take for granted.

A cooperative relationship, where we are constantly striving to improve law enforcement apparatus, is the best kind of relationship in a Federal system.

I believe the Federal Government does have a responsibility to provide backup and assistance. I know we are living in times when money is hard to come by, but we need more help for our local and State police departments from the Federal Government. The crime problem is a national problem, not just a local problem. I believe that crime is doing such a severe amount of damage to the Nation, to its inner cities, and even to some suburbs, that the Federal Government should accept a certain responsibility to help this local system do a better job.

The needs are enormous in training, in backup services, in research. This may not be a popular point of view, when Congress is trying to balance a budget. I realize people don't want to increase appropriations; but I think the services of the Bureau and LEAA are just absolutely essential.

We need more of them.

Mr. VOLKMER. So you wouldn't want the guidelines to be drafted to in any way interfere with the assistance the FBI can give?

Mr. MURPHY. That's right. In fact, I would like the local and State police people to begin making a greater input to the Federal Government, including the FBI, saying, "We need help with this; we need help with that."

Our police information systems and records systems are very weak, even with all of the improvement that's going on in the uniform crime reporting system. It's much better today than it was years ago.

There are many, many more needs that States and locals have. Exchanging information and knowledge is an important thing. One of the great contributions the FBI makes is that at Quantico, the Bureau brings police people together for the exchange of ideas.

Whether they spend a few days, a week, or 10 weeks at Quantico, it's of tremendous value to individual officers and chiefs.

It certainly broadened my perspectives, after having been in the great New York City Police Department for 12 years to have the opportunity for 12 weeks to meet with police people from across the country. My mind was opened in dozens of ways about practices and policies of other agencies.

There's a continuing need for that.

Mr. VOLKMER. Have you approached Director Webster with these ideas of the guidelines and the advisory committees?

Mr. MURPHY. I am sorry, I haven't had an opportunity to talk to Director Webster. I was out of the country almost 2 weeks. I just got back.

Mr. VOLKMER. These ideas you presented have not been broached with the Director?

Mr. MURPHY. No; I haven't talked to Director Webster.

Mr. VOLKMER. Have you?

Mr. HAYES. Yes; we talked both with Don Moore and John B. Hotis, who is involved with the legislation.

I might add that we recognize and appreciate the role that the FBI can play in both supplementing training and acting as a catalyst for coordinating law enforcement in this country. We think that role is important and necessary.

We do believe, however, that the FBI training role can be improved, their training can be improved, if the FBI accepts the recommendations of local law enforcement officials as well as other local government officials.

Mr. VOLKMER. All you want is a little input in the writing of guidelines, but let the final decision be made by the Director as to what actually goes in those guidelines?

Mr. MURPHY. My view of it, Congressman, is that you can never fit everything into the law itself.

Mr. VOLKMER. No.

Mr. MURPHY. Guidelines are necessary. You do the best you can with guidelines. They improve communication. Obviously final decisions have to be made by the people with the responsibility.

Mr. VOLKMER. My time is about up.

I would like to go back to my original question. I am not going to ask you for an answer. I would like your comments, however.

Contact with local law enforcement has been brought to my attention just yesterday by a very high official from my State as a problem with the information system, the FBI and its limitations. They have a great concern. I would appreciate being furnished information from other law enforcement officials as to how they view the information system and whether they feel it's presently adequate?

Mr. MURPHY. I would be glad to do that.

Mr. VOLKMER. Thank you.

Mr. EDWARDS. I thank the gentleman for that question. That question came up yesterday in the conference on the Department of Justice authorization bill that was resolved by the two teams of conferees from the House and Senate.

Those complaints have come to us and to other members from different parts of the country. Most of it has to do with the timelag in the NCIC; 2 hours here, 3 hours here. I think that it has been resolved and the equipment is on the way.

Mr. VOLKMER. OK.

Mr. EDWARDS. It does need upgrading and—what do they call it? Up-front equipment?

Ms. LEROY. Front end.

Mr. EDWARDS. Front-end equipment. It has been authorized.

Mr. VOLKMER. Fine. You need not get into that.

Mr. EDWARDS. Mr. Boyd?

Mr. VOLKMER. I am pleased to hear that, Mr. Chairman. I will tell my brother about it. That's where the information came from.

Mr. BOYD. Mr. Murphy, based on your experience as an officer with the New York City Police, and as commissioner of the New York City Police Department, could you give us your view as to whether the charter taken as a whole represents in your opinion a fair balance between the needs of effective law enforcement and the rights of the public generally?

Mr. MURPHY. You are talking about the charter taken as a whole?

Mr. BOYD. Based on your law enforcement experience.

Mr. MURPHY. Yes. I think it's a good thing to have a charter. People have been flying blind. It's not fair to people with the heavy responsibilities that Directors of the FBI have had, and special agents in charge, to have so much undefined responsibility.

I think that it is a good bill. I just think that what I am proposing would improve the charter a little more in what to me is such a critical relationship. I know from experience how dependent local police are on FBI assistance and cooperation.

Mr. BOYD. Thank you, Mr. Chairman. I have no further questions.

Mr. EDWARDS. Gentlemen, the Civil Rights Commission in testimony before the Senate Judiciary Committee recommended that the following checks on agent misconduct be added to the charter:

(1) Establishment of a board of review appointed by the Attorney General to review serious allegations of misconduct;

(2) Improvements of congressional oversight by granting the House and Senate Judiciary Committees full access to information about FBI internal investigations; and

(3) Inclusion of a civil right of action for recovery of damages for violations of the charter.

Would either of you care to comment on those suggestions for changes in the charter?

Mr. MURPHY. The provision about a review by the Attorney General and a committee—

Mr. EDWARDS. Well, let's just take them one at a time.

One of the chief stumbling blocks of our oversight in the past few years—and I'm sure our colleagues in the Senate have had the same problem—is that we have no way of knowing what really is going on; not that there's anything going on that we are supposed to know about, but we are operating in the dark.

Unless the FBI tells us about misconduct or criminal activity, we have no way of finding out. We have learned too much from the newspapers and from depositions in lawsuits and from disclosures through Freedom of Information. It started many, many years ago when we asked them in several letters for evidence of alleged break-ins; and they never responded. Then we had to read about them in the newspapers. It was very discouraging for us.

It seems to a lot of people, including myself, and apparently the Civil Rights Commission, that one of the improvements in the charter

would provide for some sort of auditing so that the House and the Senate people who are responsible for these laws and for the budget would have some way of checking, even at random, as to what's going on.

The Seattle Police Department, as you know, has an independent auditor appointed by the mayor. We don't have anything like that; absolutely nothing.

We have no problem with Mr. Webster and Mr. Civiletti or Mr. Kelley and Mr. Levi. We rely on what they tell us. We rely on them to have internal systems. We know the systems exist, but we don't know how they work, because we have no access whatsoever.

Mr. MURPHY. So much of the information that's in the possession of a law enforcement agency is highly, highly sensitive. There is a principle about limiting knowledge to those who need to know.

On the other hand, under the system of separation of powers between the executive and the legislative branches, there is a need to protect that separation but at the same time oversight responsibility must be accommodated in some way.

I think the principle that there will be accountability on the part of everyone within the agency is very important to have; if a failure to act responsibly is revealed, the individual must be held accountable.

Some devices may be worth exploring that would permit some kind of testing or sampling without creating the complex problem of making too much information available to too many eyes and too many ears; we are all aware of the problems that occur when confidential information gets out.

Mr. EDWARDS. I appreciate that side of it.

Mr. HAYES?

Mr. HAYES. We share the opinion that oversight is crucial and that the balancing between disclosing too much information and sharing enough so you actually know what is going on is something that has to be searched for.

We in local government must ultimately be accountable to our legislative branch, the city council, which has the right to ask questions on a regular basis. In fact, we believe councils should ask questions. The people who are giving answers should be held accountable for those answers.

How you check on those answers is the difficult part. How do you go about checking if they say something is happening or isn't happening? How do you know?

I agree with Mr. Murphy that there are ways of doing that without opening all the files and disclosing information that is really needed to be known by only a few people.

But we do agree that the oversight of Congress on the FBI is essential and should be very vigorous.

Mr. EDWARDS. That's very helpful. We have no problem with very sensitive information about nuclear weapons and all of the secret devices that cost billions of dollars that are used by our agencies throughout the world. Those are all available to us; and yet nothing is available about possible misbehavior in an embezzlement case in a bank; we have no way of finding out. If we inquire, we are told what is in the file.

It does pose a problem. I appreciate your answer. Ms. LeRoy?

Ms. LEROY. Would you comment on the third of the recommendations of the Civil Rights Commission—the inclusion of a civil right of action for recovery of damages for substantial violations of the charter?

Mr. MURPHY. I had occasion to live with the situation in New York where many civil suits were brought against the city for improper use of firearms by police officers, for example.

Because the city had to settle those cases, or lost cases when they went to trial, thus costing the city considerable sums of money, there was certainly an impact on the police department. We had to improve guidelines, training and supervision for the use of police weapons.

So if there were to be a civil liability, I think it should be on the Government, not on the individual agent who acts in good faith, makes the best judgment he can, sometimes under tremendous pressure and severe time constraints.

Mr. HAYES. As a principle, we agree that an aggrieved party has a right to redress; so, therefore, we do believe that there should be some civil cause of action.

But we also, for principles of management, believe that a cause of action should go to the city or, in this case, the U.S. Government. That, in the long run, has more impact on deterring future acts or inappropriate acts than a civil suit against an individual agent after the fact. This is because the administrator can be made accountable by his superiors in the Government to insure future court actions against the Government are not successful; to insure people are not doing this, that guidelines are being issued in order to make sure that agents of the government are not acting inappropriately.

So as a principle, we think that a cause of action against the Government with the Government holding the executive responsible for the actions of his agency has a much better long-range impact on controlling future behavior of individual agents than an after the fact civil suit against an individual agent.

Ms. LEROY. I don't know how it works in the city of New York, but in the U.S. Government, it's the U.S. Department of Treasury that pays in all of those cases. I'm not sure where the deterrent is if the money is coming out of this enormous pool and the agency which is responsible for the action feels no effect from the judgment.

I wonder if you care to comment on that?

Mr. MURPHY. If the sum is not taken from the budget of the agency, it does not suffer directly; but from a professional point of view, I think an administrator is not pleased that it's been necessary for the Government—even though not out of his budget—to satisfy a claim because of some failure within the agency. There is a deterrent effect that operates in that way.

I would assume that the Treasury Department would express its unhappiness if those recoveries were significant.

Ms. LEROY. Mr. Hayes?

Mr. HAYES. I would also add that it would seem that if enough actions were taken against an agency for inappropriate behavior, and these suits were successful so that the Treasury was continually giving out money, the people who were responsible for that agency would start to ask the executive of that agency "What's happening here, why are we continually losing suits for inappropriate behavior?"

Likewise, I'd say an action against an individual, at least in our experiences with police officers, has less of an impact throughout the agency, because the reaction is, "Well, that's just that individual, and that he's just a rotten apple in the barrel," or "I don't have to worry, it's not going to happen to me."

The impact should be on the whole agency and not on the individual.

Mr. BOYD. Would counsel yield?

Ms. LEROY. Yes.

Mr. BOYD. For purposes of the record, the Tort Claims Act, as I understand it, subjects the individual agent to personal liability. Though there is a Tort Claims Act amendment bill pending before the Judiciary Committee, that is the existing law.

Ms. LEROY. I understand that. I am talking about possible changes in the charter itself, not the Tort Claims Act.

I'd like to ask a couple more questions about training.

Your testimony, Mr. Murphy, refers to past problems in this area, in the sense that the FBI undermined efforts to raise local police educational levels and educational requirements.

Could you be more specific about that please?

Mr. MURPHY. It's a little bit of ancient history by now, but back in the forties and even in the fifties, a kind of informal doctrine was preached that only law enforcement should train law enforcement. While Mr. Hoover was Director, he was not supportive of higher education for police officers; of course, that has changed.

Now the Bureau is very supportive of it and in fact has affiliated itself with the University of Virginia for its educational programs at Quantico which now can provide university credit.

I made a reference to education as one of the problems in the past. I'd like to again emphasize that under former Director Kelley, and under Director Webster, I have been very comfortable with their policies and the directions in which they are moving the agency; but we are considering a charter for a long period of time. I made that reference to point out the importance of trying to have the best charter we can have for whoever the Director is.

Ms. LEROY. That's what I am getting at. I assume those problems are over and also the problems that you referred to with respect to selection of police chiefs and police agencies, I suspect those changes have a lot to do with the personalities of Mr. Kelley and Mr. Webster.

But as you say, they won't be there forever. I am wondering how you think the charter and/or the guidelines that you recommend can institutionalize the process that's happening now and assure that ancient history doesn't become current history again?

Mr. MURPHY. The advisory committees that would work on charter guidelines, would give a new dimension to communication among local, State, and Federal law enforcement. There could be an ongoing discussion about how to continue to refine and improve this working relationship, which is so important.

It is a relationship that is changing all the time. I believe it is improving very significantly. The creation of the mechanism of advisory committees would be a very valuable thing for now and the future to try to improve the effectiveness of our police efforts in the country.

Mr. HAYES. Dialog establishes a two-way street. Part of the problem

in the past has been the sense, at least by local law enforcement, that the FBI gave what it wanted and took what it wanted. We are suggesting guidelines and advisory committees on grounds that if local law enforcement has a say into what is going on, it will more readily support Bureau assistance. A two-way street would be clearly established for everyone to see.

We believe this advisory committee would begin that.

Ms. LEROY. I think my time has expired.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. No more questions.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. No questions, Mr. Chairman.

Mr. EDWARDS. Counsel, you may proceed.

Ms. LEROY. Thank you. I want to explore for a minute the idea of internal discipline and internal mechanisms for controlling employee behavior.

It's my impression that most internal disciplinary mechanisms that exist in local police departments, and also to some extent in the FBI, tend to concentrate on what I would call standards of conduct—showing up drunk on the job, beating your wife, not wearing your hat while you're on duty, being late, not using your gun according to rules and so forth—rather than abuse of investigative authority, or the sort of problems that the FBI found itself in in the late sixties and early seventies in terms of break-ins, civil liberties violations, that kind of thing.

Can you give us some idea as to how internal discipline structures can be designed to get at those problems rather than the standards-of-conduct type problems?

Mr. MURPHY. The problems that you cite in the sixties and early seventies were exceptions. In all honesty, I have to say that the standards of conduct and performance of the Bureau are an example not only for policing but for most Government agencies. It has been a remarkable organization.

Mr. Hoover was a genius in many respects; for example in organization and management. That's why those of us in policing see the Bureau in many respects as a model. In fact, I believe that if we could begin to bring policing up to the standards that have existed generally in the Bureau, we'd see a much improved police service in the country.

So I think there's been strong internal discipline in the FBI. The problem, which is a problem for law enforcement agencies generally, of breaking the law in order to try to fulfill the function of the agency is a problem that will always exist by the very nature of law enforcement work.

Sometimes we in law enforcement are dealing with horrible crimes; we are under tremendous pressure to deal with the safety of people and communities. There's always the temptation of stepping over a line; and I think this discussion takes us back to the discussion a few minutes ago with Mr. Edwards about oversight to make sure that when illegalities happen they are not condoned or accepted in the agency. I am sorry to say that too many police departments have known corruption, improper political interference, excessive use of force, racial discrimination of the worst kind.

I don't think that the FBI has suffered most of those problems to any great degree. The FBI is a good model with a tradition of strict

discipline and high levels of performance. Overcoming the difficulty that you referred to—which can be a very serious difficulty, I don't mean to minimize it—depends upon good management. Then I would think some kind of sampling or testing from time to time to see that the policies are being carried out.

Ms. LERoy. Mr. Hayes?

Mr. HAYES. Let me also respond—and I say this with some reservation because we have not progressed that far in policing ourselves, as far as I would have liked us to, but we are trying. I think you are right; internal guidelines and procedures for individual agent's actions should not only be addressing what you can't do, they also should tell you what you should be able to do. What is it the administration wants its agents to do? How does it want them to conduct themselves in a whole array of situations and behavioral encounters?

Administrators should begin to specify their expectations for their officers' actions. They should begin to spell out to both police officers and FBI agents, this is what we expect of you in this situation.

That ought to be followed up with some check, through staff inspections, or whatever term you want to call it to make sure agents are conducting themselves as expected. When someone does break a procedure, the person ought to be handled through an internal affairs procedure—or again whatever you want to call it—that shows to the rank and file that there is a commitment on the part of the administration to have expected behavior followed.

I think where we have fallen down is that the standards we usually promulgated are all the "don'ts" and we don't often enough set out standards of what should be and what is expected. This is because it's difficult to do and entails trying to define many different situations and the appropriate behavior for each.

I think efforts should be made to begin to give guidance to both agents and police officers as to what the administrator expects of them. That is not done and should be done for good management reasons.

Ms. LERoy. What do you think are the internal disciplinary procedures that are most effective in terms of deterring police or FBI agent misconduct?

Mr. MURPHY. I think the most important thing is to have standards and enforce them. I've often been envious of the—what I believe to be—the power of the Director of the FBI to be able to enforce standards more vigorously than is often the case under civil service in the local governments, where the employee has several kinds of appeal and one almost has to meet a criminal standard to dismiss a police officer who misbehaves. I think the Bureau has always had a high standard of performance and people are separated who don't meet that standard. That's one of the reasons why it's had the great record it's had.

Ms. LERoy. I have no further questions, Mr. Chairman.

Mr. EDWARDS. I believe that both of the witnesses mentioned the seeming increase in Federal jurisdiction that is apparent in the charter. The first instance occurs on page 30 and goes to page 31, where the FBI is authorized to investigate concerning an actual or threatened civil disorder that may require the presence of Federal troops, or a peaceful public demonstration that is likely to require the Federal Government to take action to provide assistance to facilitate

the demonstration or to provide public health and safety measures with respect thereto.

Is it your testimony that that should be taken out of the charter?

Mr. MURPHY. No. That would not be my position, Congressman. If I were a city police chief, I think I would want the benefit of whatever information could be provided by the FBI. I know the FBI has been able to provide some kinds of information in the past; I think that it's a good thing for the Bureau to be able to provide information to local law enforcement agencies that have to deal with that kind of very sensitive problem.

Mr. EDWARDS. Well, we have had communications from different parts of the country to the effect that this is a loophole a mile wide, and that the Bureau would be licensed under this provision to commence investigations as to future possible civil disorders, peaceful demonstrations protected by the first amendment, and move into areas that they are not supposed to be in.

Mr. MURPHY. Again I think it's one of the very difficult problems.

Mr. EDWARDS. There is no criminal standard there, you see.

Mr. MURPHY. I realize that's an important point. Maybe there should be a guideline to provide for authority to do a preliminary investigation and not carry it further with the approval of the Attorney General or something of that nature.

Mr. EDWARDS. Thank you.

Mr. HAYES. Mr. Chairman, in response to your first question concerning the broadening of Federal authority under section 535a, I would like to point out a significant difference between this section and section 535d(4) which also broadens Federal authority. Guidelines are required for section 535a by section 537c(c) but are not required for 535d(4). As I testified previously, this is a serious shortcoming because broad authority is mandated with no opportunity for limiting it by interpretive guidelines.

Also section 535a(A) is somewhat limited by sections 535a (c) and (d). They begin to spell out some of the limitations of the collection of information under this section.

Whether the limitations are great enough, or whether the loophole is still too large remains a question. At least there is an attempt in this section to balance these concerns. By requiring guidelines, which Congress can review, there can be a greater spelling out and balancing of competing concerns. Our concern under 535d is that if we are talking about loopholes, that creates as great a loophole as can be imagined, with no requirement of guidelines which would allow some opportunity for review.

Mr. EDWARDS. Do you think congressional committees should require the guidelines to be submitted at the same time we mark up these charters so that we should know how these various important provisions are going to be interpreted by the agency?

Mr. MURPHY. From the point of view of time, it occurs to me it might require quite a bit of work to develop those guidelines. Perhaps the legislation should not be held up; but generally speaking, I think that when drawn, the guidelines would be available for review.

Mr. EDWARDS. Mr. Hayes?

Mr. HAYES. I guess I would pose this more as a question: Would not under your oversight responsibilities, would not the guidelines come into question under that oversight responsibility?

In other words, the right of the committee or some committee to review those guidelines?

Mr. EDWARDS. Yes; we generally do that. That's correct.

Do you think that a police agency should do personnel investigations of people under consideration for rather sensitive jobs? Do you do that in New York?

Mr. MURPHY. You mean for a private employer?

Mr. EDWARDS. No; for the Government. Let's say that the mayor of the city of New York wanted to appoint a judge. Would the police department do the background investigation?

Mr. MURPHY. Not generally. There might be occasionally an inquiry concerning criminal record on a confidential basis, but that would be as far as it would go.

Mr. EDWARDS. Do you have any problem with police officers doing background investigations?

Mr. HAYES. For positions with the Government? I think that is a sensitive issue that requires a great deal of consideration. In a local jurisdiction, I would have problems if local police departments were to do background investigations of people that were eventually going to be in some position of either oversight or involvement with the department.

Mr. EDWARDS. Are there any further questions?

Ms. LEROY. I have a few more questions, if there is time.

Section 533(B)(iii)(II), page 12, is the section dealing with investigation of terrorist activities. It creates a standard for investigation that permits the FBI to investigate where it suspects multiple violation of State law without any requirement that there be a State or local request for assistance.

Do you see that section?

Mr. MURPHY. Yes.

Ms. LEROY. I wonder if you would comment on that provision in terms of your own concerns about the problems in State and local relations with the FBI, concerns about federalism that you raised in connection with other sections of the charter?

Could this section amount to Federal preemption in this area, depending upon how it's interpreted at the time that it's used.

Mr. MURPHY. Once again you are grappling with the very difficult problem of how severely you limit the authority of law enforcement and my bias always is to let law enforcement have authority.

It must have authority to do its job. It must often exercise that authority under very difficult conditions without time for consultation but law enforcement officials must be held accountable for using good judgment and exercising that authority in good faith and not misusing authority for any improper purpose.

There is always the danger of not providing authority that could save a life or many lives or result in the apprehension of a dangerous criminal. We have to acknowledge that the people to whom we give law enforcement authority, whether it's the local police officer or a special agent of the FBI, must be a professional trusted person. Yet we must acknowledge that there's always the danger of misuse. Strict accountability must be provided so that the misuse of authority will not occur.

Ms. LEROY. Mr. Hayes?

Mr. HAYES. In my reading of it, it would appear that the crucial word in this section is the word "pattern." That again if that word were not there, and it just read "a terrorist activity in violation of the criminal law of the State," the jurisdiction would be much broader.

Again either through oversight or through very stringent guidelines, the word "pattern" and what it means to limit when the FBI gets involved in the investigation of this would be important. I would imagine that it probably is more a function of the oversight to make sure that they are not extending their jurisdiction beyond what was intended.

In case the word "pattern" means more than just a terrorist activity but a series of terrorist activities.

Ms. LEROY. Does it concern you at all that this charter may be creating Federal investigative authority where there is no corresponding Federal jurisdiction for prosecuting the crimes? The result of this section and certain other sections of the charter may be to do just that? This charter does not intend to create substantive jurisdiction.

Mr. HAYES. As the role of the agency to provide assistance to local government, I don't see a problem with that. In other words, if that information were of use to local agencies, the local agency can pursue the crime under State jurisdiction.

Ms. LEROY. This section doesn't talk about that.

Mr. HAYES. As part of the role of the FBI to provide assistance to local government, I don't see a problem with that. In other words, if that information were of use to local agencies, the local agency can pursue the crime under State jurisdiction.

True. However, under section 533c(b) the FBI may share information it collects under this terrorist section 533(b) with local authorities. The word "may," however, makes this sharing discretionary. Guidelines established under 533c(b) should require the sharing of information so that information collected on terrorists under section 533(b) is given to appropriate local authorities. Otherwise, authority will have been extended to investigation of terrorist activity which is in violation of State criminal law with no requirement that local authorities share in the fruits of that investigative mandate. For the FBI to have authority to investigate terrorist activity and then not share the information would be to defeat the purpose of what they are supposed to be doing; carrying out the role of providing assistance to local government. The language in 533c(b) should require them to share their information.

Ms. LEROY. Are you saying that what you would like to see in this section is a request for assistance requirement or some requirement that if information is uncovered, that the FBI then communicate it to the local authorities?

Mr. HAYES. Yes; when section 533c(b) guidelines are promulgated, they should establish a presumption that the FBI is to share collected information with local agencies unless there is some overriding reason why it should not be shared, such as a local agency leaking that information.

Ms. LEROY. Thank you.

Mr. EDWARDS. Mr. Murphy, Mr. Hayes, we thank you very much. Your testimony will be of great value to us. We do appreciate your being here today.

Mr. MURPHY. Thank you.

Mr. HAYES. Thank you.

[Whereupon, at 4:05 p.m., the hearing was adjourned.]

# LEGISLATIVE CHARTER FOR THE FBI

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TUESDAY, NOVEMBER 13, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 2 p.m., in room 2226 of the Rayburn House Office Building; the Honorable Don Edwards, chairman of the subcommittee, presiding.

Present: Representatives Hyde, Volkmer, and Sensenbrenner.

Staff present: Catherine LeRoy and Janice Cooper, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This afternoon we continue our examination of H.R. 5030, the proposed legislative charter for the Federal Bureau of Investigation.

The primary focus of the hearing today is the impact of the charter on existing governmental policy with respect to the dissemination of records and information. There are several provisions in the charter specifically affecting retention, dissemination and destruction of files and information collected and maintained by the Bureau. And, of course, the charter as a whole deals with the collection of information pursuant to the FBI's responsibility to investigate actual or suspected violations of Federal criminal law. We want to know whether these charter provisions affect current law and current Government policy in these areas, how they do so, and whether the changes, if any, are justified.

Our first witness is Marshall Perlin, who appears today in his capacity as counsel for the Fund for Open Information and Accountability, Inc. Mr. Perlin is also in private practice in New York. Over the last few years he has accumulated vast experience in the area of information law and policy in his capacity as lead counsel in the *Meeropol* case.

Mr. Perlin, we welcome you. Without objection, your entire statement will be a part of the record, and you may proceed at your own speed.

[The document follows:]

## STATEMENT OF MARSHALL PERLIN, FUND FOR OPEN INFORMATION AND ACCOUNTABILITY, INC.

I submit this statement to you in my capacity as counsel for the Fund for Open Information and Accountability, Inc. and also as an attorney who has been actively engaged in litigation and matters bearing upon the implementation and enforcement of the Freedom of Information Act since its effective date, February 1975 and for many years prior thereto as an attorney confronting problems faced by my clients arising out of the use of FBI agency files by government agencies and private institutions which files were always not accessible to my clients. The

Fund for Open Information and Accountability, Inc. was organized to support, strengthen and accomplish the purposes of the FOIA and has as one of its prime objectives dealing with the problems confronted by those seeking to obtain files from the FBI as well as those seeking to analyze and disseminate the information contained in those files as they bear upon events of public importance and educational and historic value and relate to the constitutional rights, liberties and guarantees of the people and the impact of the FBI's activities thereon.

I particularly wish to address my comments to those portions of the FBI's proposed charter, H.R. 5030, as they deal with the (a) dissemination and distribution of FBI files and information; (b) the destruction of information, files and records of the FBI and (c) the imposition of a cloak of secrecy around the files, records, operations and activities of the FBI, lawful and unlawful. Obviously such analysis must be considered in the context of the whole thrust of the charter proposed by the FBI, as well as the record of the agency's prior activities.

It is our firm conviction that the provisions of the charter, as they relate to retention, dissemination and destruction of files and imposition of immunity to examination and accountability all serve to effectively destroy the FOIA and the Privacy Act as it applies to FBI files as well as exempt the FBI from the legal requirements and provisions for the preservation of records of historical and other value under the Archival and Record Management Acts (44 USC § 2101 et seq.; 2901 et seq.; 3101 et seq. and 3301 et seq.).

As an attorney who has been engaged in the practice of law for more than three decades, I have represented a multitude of clients in civil and criminal litigation, in administrative proceedings as well as before congressional committees whose rights and privileges have been impaired and injured because of the secrecy surrounding, and the total non-accessibility of FBI files and records. I have represented persons who have been injured and convicted as a result of the suppression of exculpatory material in the files of the FBI. I have represented persons who have been injured and irreparably damaged by the secret dissemination of false and inaccurate reports and information by the FBI to governmental and private institutions.

I need not repeat before this Committee the scope and nature of unlawful FBI activity impairing the rights of hundreds of thousands, if not millions, of people over the decades of its existence. Nor need I itemize the various unlawful, illegal techniques and methods and the various covert operations of the FBI which struck at and undermined the very heart of our constitutional system and democratic processes.

The revelations flowing from the Watergate events and the investigations by congressional committees in 1973 and thereafter, and as a result of disclosures of illegal and unusual activities obtained under the FOIA to the present time confirm the fact that we can never permit a national police agency to once again operate under a cloak of secrecy and in the absence of accountability to the governors, i.e., the people. The FOIA was enacted in 1974 to assure that that would never happen again. History has established that a secret police becomes a "menace to free government and free institutions." A secret police breeds and fosters unlawful conduct on its part as well as others.

The need for disclosure and public accountability of the operations and activities of the FBI was long recognized. Concern about the impact of the FBI's activities on basic constitutional rights has long been expressed. In 1924 then Attorney General Harlan Fiske Stone, concluded that the FBI was a "secret political force" and directed that all domestic intelligence operations by the FBI be terminated. The late Senator Phillip Hart, a member of the Church Committee, after hearing the scope and nature of the unlawful activities of the FBI, stated:

"What you have described is a series of illegal actions intended squarely to deny First Amendment rights to some Americans. That is what my children have told me what is going on. Now I did not believe it.

"The trick now, as I see it, Mr. Chairman, is for this committee to be able to figure out how to persuade the people of this country that indeed it did go on. And how shall we insure that it shall never happen again? But it will happen repeatedly unless we bring ourselves to understand and accept that it did go on.

"And now my last note. Over the years we have been warned about the dangers of subversive organizations, organizations that would threaten our liberties, subvert our system, would encourage its members to take further illegal actions to advance their views, organizations that would incite and promote violence, pitting one American group against another.

"And I think the story you have told us today shows us that there is an organization that does fit these descriptions and it is the organization, the leadership of which has been most constant in its warning to us to be on guard against such harm. The Bureau did all of those things." (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress, First Session, Vol. 6, November 18, 1975, p. 41.)

The passage of a mere four years, putting aside subsequent revelations, does not permit us to ignore or fail to deal with the fact that over the last half century of the FBI's existence it has essentially been almost a government unto itself, accountable to no one—the Attorney General, the Congress, the courts or the people—engaging in unlawful activity and investigations beyond its competence and jurisdiction. If we are to protect, maintain and advance our democratic society and processes, if we are to safeguard our constitutional rights, we must guarantee not only that the authority of the FBI be sharply delimited and curtailed, and that it comply with the Constitution and the laws of the land and it be compelled to disclose and account. To this end the provisions of the FOIA must be vigorously enforced, implemented and expanded. The right of the people to know is an essential ingredient of the people's right to govern and seek redress of their grievances. This constitutional right would be seriously impaired, if not destroyed, were the provisions of the FBI charter relating to the dissemination, control and destruction of information and records be sanctioned, or if the provisions of the charter authorizing a reimposition of a cloak of secrecy be allowed.

It must be recognized that at least as of 1978 the FBI had approximately 6,500,000 files at its headquarters alone, with indices and records of 60,000,000 people and at least ten million files and even larger indices are to be found in its 59 field offices. The FBI has acknowledged that at least 50% of these files are not criminal files but files bearing upon the FBI's concept and classification of subversive activities, domestic intelligence and counter-intelligence touching every aspect of the lives of the people and of members and officers of every branch of government.

The files and records of the FBI, both in headquarters and field offices, are unique and irreplaceable and of the greatest historical, research and legal value. They contain and reflect evidentiary, informational and functional documentation and chronicle the role and impact of a national political-criminal police force of tremendous power and influence. The operations of this agency have had a profound effect upon the legal rights and remedies of untold numbers of individuals and organizations and upon the constitutional rights and liberties of millions of people as well as the policies and functioning of government in areas far broader than those relating to the investigation of violations of federal and criminal laws. These files and records constitute a part of this nation's history which its people and government have a right and need to know. The preservation and access to FBI files for research and analysis and the lessons to be drawn therefrom are essential to assure the integrity of the democratic process.

The history to be derived from the files and records of the FBI bear upon the most fundamental questions of relationship between government and people, the role of police and intelligence agencies in a democratically ordered society. The FBI files and records relate and bear upon fundamental questions of federal-state relations; the fair administration of the civil and criminal law, the impact of the FBI upon the lives of the people of the United States.

The files and records of the FBI contain substantial information about conduct which has affected and impaired rights of individuals and organizations. The preservation of these files is essential so that they are available to persons seeking to invoke their legal remedies for injuries done them. Only by preserving the files and records of the FBI may plaintiffs herein invoke their rights under the FOIA and exercise their constitutional liberties and prerogatives.

The Archives and Record Management statutes provide that the Archivist of the United States, the historian of this nation, is required to ensure, in the public interest, the preservation of records of "historical or other value" (44 USC § 2103). He is required to safeguard our records so there will be "accurate and complete documentation of the policies and transactions of the Federal Government" and the "judicious preservation" of our records (44 USC § 2904). He is required to establish standards for the "selective retention of records of continuing value and assist Federal agencies in applying the standards to records in their custody" (44 USC § 2905). To this end each agency "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish information necessary to protect the legal and financial

rights of the government and of persons directly affected by the agency's activities;" (44 USC § 3101).

Records must be preserved "as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government or because of the informational value of data in them" (44 USC § 3301). Records are to be destroyed only if they do not have "sufficient administrative, legal, research or other value to warrant their further preservation" (44 USC § 3303). Records are not to be destroyed which may bear upon any claims by or against the government without the express consent of the Comptroller General (44 USC § 3309). The Archives and Record Management statutes are, by mandate, totally controlling in the preservation or other disposition of the records of government.

Before any record is to be destroyed, the Archivist of the United States must certify in writing, after a meaningful, valid appraisal, that the documents sought to be destroyed "do not have sufficient value for purposes of historical or other research, functional, documentation or the protection of individual rights to warrant further retention by the Federal government." Such certification, with or without retention periods, has been the precondition for destruction since 1943 or earlier.

An examination of § 533c(c) provides that the FBI at its sole option, at its absolute discretion is authorized to destroy investigative files ten years after the termination of an investigation, a time to be decided upon by the FBI, or ten years after the termination of a prosecution. This section reserves to the FBI the option to keep any files it deems necessary for a longer period for reference, training, administrative or anticipated litigation purposes. Only after the FBI determines that it wishes to hand over any files to the Archives of the United States will it do so. Thus by this subsection of the charter the FBI has been made exempt from any of the Archival or Record Management statutes and its decision is not reviewable by any branch or agency of government.

Vesting this absolute power with a political police agency is shocking and in fact would be authorizing the FBI to be a special agency of government which need account to no one, an agency above the law.

The purpose of this provision is obvious. It effectively immunizes the files and records of the FBI not only from the Archival and Record Management statutes but from the FOIA and Privacy Act as well. Of the 60 million or more people whose names or files are to be found in the records of the FBI, only a minuscule portion even know that such files exist or that they are the subjects of such files. This section of the law would permit the FBI to engage in improper or illegal activity, activity beyond its jurisdiction, activity that impairs the constitutional rights, the livelihood, the lives of people with no obligation to account. It cannot be ignored that the FBI at the same time proposed amendments to the FOIA which places a seven year moratorium on access to FBI files.

As will be set forth infra, the FBI has been ignoring, unfortunately with the knowledge and approval of the National Archives and Records Service its obligation under the Archival and Record Management status, and it has so devised a scheme which has been in effect since 1945, which permits it to destroy its own files when it wishes, all to the end of avoiding accountability or disclosure to anyone. History has shown that there were activities of the FBI which were unlawful and the FBI was hiding that fact. To condone the continuation of such illegal procedures in the management and disposition of FBI files would be unconscionable. The very fact that the FBI has requested this provision in its charter is an implicit acknowledgment of culpability, of wrongdoing on its part.

The 1974 amendment to the FOIA became effective on February 19, 1975, for the first time making available to the public the files and records of the FBI. That agency has resorted by every device and means to frustrate and impair the effectiveness of that statute. This has been accomplished by refusing to comply with requests by delaying the responses, by making intentionally inadequate search of its files and records and by invoking indiscriminately with a broad brush in the absence of good faith every possible exemption from disclosure under the FOIA. It has failed to comply with court orders directing production of files. It has destroyed files notwithstanding orders of the court enjoining such destruction.

The FBI by its resistance has made the FOIA a very costly procedure for the requester, and has served to deter many people who have requested files from pursuing a request in the face of anticipated expenses and resistance.

From the very enactment of the statute claims were made that it was impairing the efficacy of the FBI, it was consuming too many hours, that it was revealing the innermost secrets of the FBI thereby depriving it of the opportunity to effectively

function. The FBI caste aspersion upon requesting parties even where the Department of Justice instructed them to make adequate search and production of files and to cease making unwarranted claims of exemption. The FBI continued its efforts to effect a de facto repeal of the statute.

At the same time the FBI devised a scheme and method and unlawfully obtained authority from the National Archives Records Service in order to avoid compliance now and in the future with the FOIA (see *infra*.) That such is the intention of the FBI with the aid and connivance of the National Archives Records Service is fully reflected and supported in records obtained from those agencies and testimony given by their representatives under oath. *American Friends Service Committee, etc., et al. v. William H. Webster, etc., et al.* (D.C.D.C. Civ. No. 79-1655).

Leading officials of the FBI appeared before audiences throughout the country complaining about the FOIA and seeking public support for its amendment to the point of non-efficacy. The present director of the FBI not only authorized the destruction of important records in the custody of the FBI but called for a ten-year moratorium on access to files of the FBI under the FOIA. The culmination of these efforts are epitomized in the proposed amendments of the FOIA submitted by the FBI on June 19, 1979 and the provisions of this charter now before this Committee.

In February, 1975 I in behalf of the sons of Julius and Ethel Rosenberg made a detailed request for the FBI files relating to the Rosenberg-Sobell case. Not one page was given by the FBI. We were compelled to institute an action in July 1975. On August 1, 1975 the judge of the district court directed that none of the files requested be destroyed. On August 27, 1975 the judge directed that the FBI produce the requested files subject to validly claimed exemptions which were required to be factually justified by the FBI.

The Department of Justice and the Attorney General acknowledged that the plaintiff's request for the files and records pertained to a matter of informational and historical significance and importance of world-wide interest. In November 1975 the FBI falsely represented to the court that the 33,000 pages it was producing represented a full and total search and production of all of the requested files. Sixty percent of the pages produced were substantially deleted. It too, until January 13, 1978 and additional orders of the court and 19 days of deposition before the FBI conceded the inadequacy of its search and production and only then did it commence complying with the request made in February of 1975. Since that time approximately 150,000 pages have been produced. Notwithstanding, more than 100,000 pages have been withheld on claims of b(1) exemption (national defense and foreign relations) alone. Further litigation established that even this production was incomplete and that files had been destroyed during the pendency of the action, notwithstanding the court's injunction. Now once again the FBI claims its search is complete, which plaintiffs vigorously dispute and which is a matter sub judica.

Nevertheless, as a result of the production of a limited portion of the requested files, we have been able to derive much information bearing upon the question of the preservation or destruction of FBI files. I do not here dwell upon the revelations of suppressed facts and evidence which if known would have resulted in the acquittal of the Rosenbergs and Sobell or would have resulted in the setting aside of the conviction in post-trial collateral proceedings.

Rather, I direct myself to what these files represent, files relating to two organizations and 90 individuals. They reveal unlawful activity on the part of the FBI in intruding upon the lives and well-being of thousands upon thousands of innocent people engaged in lawful activities. They reveal break-ins, thefts, mail openings, electronic surveillance, COINTEL program surveillance and intrusion upon the most personal and intimate affairs of individuals never accused of any crime. They reflect investigations which resulted in the injury of lives of workers, scientists, teachers, and loss of jobs.

These files reflect at the same time information of tremendous historical and research value. They contain documents and records, they reflect attitude and policies on the part of the FBI and other agencies of government. They reflect a history of a significant portion of our national life and the organizations' and the people's social and political activities from the late '30s to the late '70s. Most of the people whose files were obtained and most of the people whose names and records and activities are reflected therein are not "name" persons, noted persons, people in the news. They are the common people who are the essence of this Nation's history and life and who are the guarantors of the democratic process.

It is such files as these and millions more which the FBI wishes to destroy to prevent disclosure, accountability and redress of grievances.

In the course of the Meeropol litigation and my deposition of agents of the FBI covering 19 days of testimony and a review of the files, I was able to obtain information which lead me to inquire as to the procedures being followed by the FBI in conjunction with the National Archives in its destruction of files over and above those files which were being destroyed or otherwise disposed of without any claim of sanction or approval.

Learning that the FBI with the approval of the National Archives was unlawfully destroying files and after obtaining records from the National Archives Records Service ("NARS") Disposition Division, and after consulting with the Fund for Open Information and Accountability, Inc. and persons having a vital interest to preserve the files of the FBI, an action was instituted in their behalf. This action, *American Friends Service Committee, etc., et al. v. William H. Webster, etc., et al.* seeks to enjoin any further unlawful destruction of FBI files in violation of the Archival and Records Management statutes and the FOIA and Privacy Act. In the course of this litigation depositions were taken for a period of 12 days of representatives of NARS and the FBI bearing upon their conduct in the destruction of files.

Both prior and in the course of that litigation it was learned that no files were ever seen by NARS or the National Archives except for two to three dozen files on an afternoon in December of 1976 and 76 files in the summer of 1978. Notwithstanding that fact, since 1945 appraisers of NARS have been writing "appraisals" and memoranda certifying that millions of files authorized to be destroyed now and in the future do not "have sufficient value for the purposes of historical or other research, functional, documentation or the protection of individual rights to warrant their retention by the federal government." The FBI would submit a request for destruction of files without meaningful or informational data contained therein. NARS would then "appraise" and the Archivist would "approve" the destruction of the files and since 1945 to the present day hundreds of millions of pages of files and records of the FBI have been destroyed or authorized to be destroyed on the basis of such false, fictitious certifications.

In 1946 the FBI, based upon the fictitious certification, received authority to destroy all of its closed field office files upon the representation, false in fact, that the field office files were merely duplicative of the "permanent" headquarters' files.<sup>1</sup>

Three months after the effective date of the FOIA, in May, 1975, the FBI requested and received authorization for the destruction of field office files which had no counterpart in headquarters.

The FBI's request for the destruction of these field office files was based upon its claim that the investigative matter resulted in no prosecution, there was lack of identification of the perpetrator, or that the investigation engaged in was beyond the jurisdiction of the FBI. In fact the great majority of these files were in the "subversive-domestic intelligence" categories, primarily files representing investigations of individuals and organizations lawfully engaged in constitutionally-protected activities, not investigations of violations of federal criminal statutes. The number of field office files far exceed those contained at headquarters. In 1974, of all the files opened in the field offices, where all investigations take place and where all Investigatory documents originate, only 40% of the files opened in the field office had any headquarters counterpart.

In 1976, after the enactment of the FOIA, the FBI requested and received authorization for destruction of FBI field office files which admittedly contained records not duplicated in headquarters on the rationale that the "substance" could be found in the "permanent" headquarters files.

In the spring and summer of 1976, NARS and the FBI met to devise a plan and scheme which would authorize the destruction of anywhere between 40 to 70 percent of all of the headquarters files of the FBI. The documents reflecting these meetings establish clearly and unequivocally that the destruction was motivated by a desire to evade compliance with the FOIA. The FBI found compliance "too burdensome and costly". If files were destroyed the response to requests was simply that the file did not exist and no grounds for withholding need be given. When the FBI destroys a file it destroys indices, abstracts and any other record that would reflect the file ever existed. NARS equally desired the destruction of files and records of

<sup>1</sup> Notwithstanding the authority to destroy, the FBI, then believing that its files were immune from access by anyone outside of the agency, immediately imposed a 25-year moratorium on the distribution of such files, reduced in 1974 to a 20-year moratorium. While some files were "stripped", few files were in fact destroyed.

historical significance as well as others, and would refuse to accept such records for permanent retention due to "complications" which would be encountered as a result of the FOIA. Thus the position of NARS, as stated in an FBI memo was:

"Additionally, the National Archives and Records Service (NARS) placed an indefinite retention period on all basic violation categories because of their historical significance. NARS is now reluctant to accession records in large volume due to complications encountered as a result of the Freedom of Information and Privacy Acts and records they previously felt should be retained for historical reasons are now being reevaluated since they would be responsible for responding to requests if they took custody of the records. FBIHQ's continuing need for these records should now be reevaluated since a short retention period would have a significant impact on manu operations, such as: (1) burdens in handling responses to Freedom of Information and Privacy Act requests, (2) reduction in the staff at FBIHQ, resulting from less records to maintain and review, and (3) result in significant savings in space."

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"This position is now subject to reevaluation and there is an indication that NARS will not be interested in obtaining the many categories of records that were initially listed in the Records Retention Plan for historical reasons because of the burdens and complications of the Freedom of Information and Privacy Acts. That is, once they took custody of the records they would be responsible to respond to requests. They most likely would now authorize the destruction of these records once the Bureau determined they no longer serve a useful purpose. Perhaps there would be exceptions for certain major cases with historical significance such as the Lindbergh kidnapping case, and it may be necessary to retain a representative sample of investigative matters in selected classifications." (FBI Memo June 7, 1976 Decker to Jenkins, File No. HQ 66-3286.)

The FBI's perception of what records should be destroyed as lacking historical, research, legal, informational or other value is reflected in an FBI memorandum dated August 2, 1976. Decker to Jenkins, when it stated:

"Because of social-political factors, files relating to World War II activities could be considered for destruction. Files relating to internal security-extremist matters without foreign involvement such as Klan, Minutemen, Nation of Islam, Black Panther Party, Anti-Riot and Bombing matters could be considered for destruction after they are ten years old."

The plan devised by the FBI with NARS for the destruction of historical records and records bearing upon individual rights affected by FBI activity were sufficiently shocking that some of the personnel of NARS who were without authority to veto the plan, voiced their vigorous protest and insisted that files should be preserved to permit accessibility under the FOIA and to enforce legal rights.

Fortunately the public did not forget the disclosures brought about by the congressional committee hearings and FOIA release of documents, and articles soon appeared in newspapers and magazines expressing concern from the most impressive and diverse sources, as a result, the FBI and NARS determined it might be expedient to obtain favorable comment from the relevant congressional committees having oversight before committing the deed. These proposals were submitted to these committees in July of 1977 and while the plan was not legally dependent upon congressional committee approval, NARS and FBI soon became aware that their proposal was looked upon with a warranted degree of suspicion.

The proposed charter affords the FBI the means of avoiding the entire process. It can ignore NARS and the provisions of the Archival and Record Management statutes and it alone will determine in secret when and what files it will destroy and it alone will determine what files have historical or other value. By these means, they will be effectively rid of their obligations under the FOIA as well. In 1978, the public outcry when it was learned that the FBI with the sanction of NARS was destroying field office files with retention periods varying from six months to five and ten years compelled the FBI and NARS to seek to cover up its prior misconduct.

Both of these agencies determined to engage in a post hoc "study and review" to justify the massive destruction of field office files. This post hoc study and review was based upon a limited, incomplete examination of 76 FBI files in field offices and 72 counterpart files in headquarters. The two employees who engaged in this intensive "study" made limited and marginal factual notations, did not read all of the files and one of the employees soon disposed of the documents reflecting the factual basis of the December, 1978 report issued by NARS. In

that report, it was concluded and stated that field office files were mere fragment, of headquarters files of no historical use or value and not warranting preservations. Under oath in *American Friends Service Committee v. William H. Webster, supra*, employees of the FBI and NARS were compelled to acknowledge that the most complete files were to be found in the field offices and if any files were partial or fragmentary it would be those at headquarters. Testimony adduced under oath established that the size of the field office files generally are 2 to 7 times greater in quality and detail than that of headquarters. The headquarters files reveal little, if any, of the basic primary evidentiary data or how the alleged information was acquired. Finally, the FBI acknowledged that most investigations are carried out solely by the field offices and that primary and original investigatory records, materials, notes, exhibits and other records are collected by and housed solely in the field offices. These include informer, "confidential source" records, logs, notes, comments and memos of case agents and the special agent in charge of the field office as well as the raw data obtained by investigative techniques and method used, the indices, records and files reflecting these activities, including logs, transcripts, tapes, photographs and various surveillance documents in addition to original statements of witnesses, suspects and others. In addition, most administrative records relating to the particular investigation are held solely in the field office files.

It is thus apparent that the anxiety and rush to destroy FBI field office files was a product of the FBI's awareness that it was in the field offices that the nature of its operations, conduct, transactions and techniques, and particularly its unlawful operations, were to be found.

Notwithstanding the profession of concern to protect First Amendment and other constitutional rights and the conditional and contingent promises to behave lawfully found in the FBI charter, it can be given little credence. It is a historical fact that the primary focus of FBI activity, the area in which it has most consistently violated the laws of the land has been in its investigation of constitutionally protected social and political activity of the people and their organizations. The primary use of informants is not in the area of investigating organized crime, an area in which the FBI has been markedly unsuccessful. Its focus of covert operations, infiltration, the use of informers, surveillance, intrusion and invasion of privacy has been in the area of legal, political and organizational activity on the part of the people to advance their rights under the law.

As to those files that it does not wish to destroy, the FBI wishes to cloak them with a blanket of secrecy. Thus we find in the proposed charter that § 513a grants total and unequivocal immunity from disclosure of confidential "informants" except in rare instances of ex parte, in camera disclosures. The confidential "informant" is defined as any person, organization, or entity (and frequently means) which results in the obtaining of information legally or illegally on an alleged implied premise of confidentiality. The charter as proposed permits the creation of a horde of informants that can penetrate, impair and cause irreparable damage to the body politic.

Equally impermissible and unconstitutional are the provisions of the charter that authorize the Attorney General and the Director of the FBI to make secret guidelines, standards and procedures employed by the FBI (§ 537b). There would be accountability to no one, save the need to make limited disclosure of the reasons for secrecy to the Committees of the Judiciary of the Senate and the House of Representatives. It is not the fear of disclosing technical methods, means or devices that the FBI is concerned about keeping secret. Rather, its concern is to keep secret the nature, scope and manner of FBI operations including resort to improper and illicit conduct.

The courts under the charter would be deprived of jurisdiction to consider any claim in any proceeding based upon violations of the charter, its guidelines or procedures, and would be precluded from granting a motion to quash a subpoena, suppress evidence or dismiss an indictment which was brought into being as a result of unlawful activities of the FBI in violation of public or secret guidelines or procedures. This would sanction, approve and permit the denial of constitutional rights, denial of even the color of due process and the denial of any lawful remedy.

#### DISSEMINATION OF INFORMATION

Section 533c in conjunction with 535b and 535c, along with § 536a authorizes, sanctions and empowers the FBI to disseminate what information it wishes to all federal agencies as well as to state, local or foreign agencies involved in investigative or criminal matters, and to private institutions, agencies and employers.

This is a practice that has long been engaged in by the FBI at its option to disseminate information obtained by the FBI or received from other agencies of government, federal, state or local. This dissemination of information has been utilized by the FBI to knowingly spread false, inaccurate and misleading information. It has been utilized by the FBI to impair the social, political, economic and most personal rights of hundreds of thousands of people. It has been used by the FBI to mislead, intimidate, and manipulate the public media and the means of communication. It has been used by the FBI to interfere and to harass individuals as it sees fit. It has been used to intimidate officials and agencies of government. It has been used as a form of blackmail.

This power to disseminate information, false, inaccurate and misleading, frustrates the purpose of the Privacy Act. Even assuming the subsequent expungement or deletion of an FBI file, once the information is disseminated it cannot be recalled.

The power to disseminate information secretly acquired and withheld from public scrutiny and accountability is to vest power in the secret political police which can only destroy our most fundamental rights and liberties and is the very antithesis of democratic process and a grave peril to a democratic society.

#### CONCLUSION

I have directed this statement pursuant to the Committee's request to certain aspects of the FBI's proposed charter. I nevertheless must state in behalf of myself and the Fund for Open Information and Accountability, Inc. our firm conviction that this legislation in its several parts and its totality constitutes a grave threat to our liberties. It grants legal license to the illegal conduct and practices of the FBI, it expands its authority to engage in such conduct without public disclosure or accountability.

The FBI under the statutes as it now exists has limited jurisdiction. The charter expands the FBI's jurisdiction, gives it untrammelled authority to engage in conduct which is today unlawful. Notwithstanding the limitations of the FBI's present authority, it has continued to act far beyond its competence and jurisdiction against the best interests of this country and its people. It would be tragic if under the cloak of the "needs of law enforcement" we would compromise and impair and ultimately destroy the very liberties guaranteed by our constitution.

The only statute which might be considered appropriate for consideration would be one to substantially curb and curtail the powers of the FBI, concomitantly insuring the broadest accountability and the greatest public disclosure along with rights and remedies to the people when the FBI engages in conduct beyond its limited jurisdiction.

#### TESTIMONY OF MARSHALL PERLIN, FUND FOR OPEN INFORMATION AND ACCOUNTABILITY, INC.

Mr. PERLIN. Thank you.

I must say that in appearing here today, it compelled me to think back many years about the period of time when this House was actively engaged in seeking the enactment of what ultimately became the Freedom of Information Act of 1966, and was amended in 1974. I think back over those many years and the fight to have accountability in disclosure of FBI files, and the success that was achieved in 1974 when it was made an effective and meaningful statute.

And then I must confess also I have to think back over 30 years or more of practice, when I represented people in order to protect their rights. One of the things I needed to effectively protect their rights was access to FBI files which were going to courts, to investigative agencies, to investigative committees, and to administrative agencies which were making decisions on the basis of secret information which was unavailable to my clients.

In this context, and directing my comments to those provisions of the proposed FBI charter dealing with the retention or destruction and dissemination of information, to put it in blunt summary form,

it is my feeling that this charter, in effect, insofar as the FBI is concerned, destroys the Freedom of Information Act as an effective instrument to obtain the files of the FBI.

Also, as a result of experience and being involved in litigation pertaining thereto, I find that this body of work the files of the FBI—and it is the product of over 50 years of labor—are being destroyed. By the terms of the charter the files of the FBI are being made exempt from the archival statutes and record management statutes, and it becomes a means of destroying a body of records that is unique. There are no other files in Government such as those of the FBI.

Its scope, its area, its impact, upon private citizens and public citizens, upon officials, upon every instrument and arm of government is tremendous. If we have any doubt about it, that doubt has been totally removed from having examined, I must confess, in excess of 200,000 pages of FBI files primarily relating to the *Meeropol* case, but other cases as well. You see a body of work, you see records that can be found in no other place, that gives you a history, not only of what the FBI did and their attitude and the attitude of Government, but also that gives you a history of misconduct, unlawful action, criminal activity engaged in by a police agency which is operating in secret.

Hence, when I look at the 533(c), subdivision (c) and the destruction of information, under this bill contrary to what exists today, the FBI would be free at its own option and its own time, after the passage of 10 years, to destroy any file it saw fit to destroy, as well as keep any file it saw fit to keep, and it would be the sole arbiter and the sole judge.

Now under the statutes as they now exist, any record of historical research, legal value, or any record that implies and reflects FBI activity that affects the rights of an individual, must be preserved. That is under 3105 of title 44, as well as 2305 and certain other sections. This would be eliminated.

The FBI would not be required to keep a single one of those documents and could destroy them, and would destroy the means of affording anyone the opportunity of seeking any redress of grievances if you've been harmed by it, and would make the FBI immune from accountability. It would at the same time permit the FBI to act as it will. There would be no effective oversight. How well and how diligently any particular committee operated, it could not do that which the FOIA does in compelling accountability by disclosure.

Now there are two particular matters in litigation which I have been involved in, which I think pertain directly to this issue. Notwithstanding the provision of the statute that no record could be destroyed without an appraisal by the National Archives, and notwithstanding that this statute has been in effect since 1943, millions of pages of FBI files now are being destroyed, without being examined by the National Archives, without being appraised by the National Archives, other than by receiving a request on one or two sheets of paper with the FBI saying, "We want to destroy files." Without one bit of information, the National Archives has been certifying without seeing any documents, that these documents do not affect individual rights, they have no historical value, and they can be destroyed.

Now we started an action to enjoin such unlawful activity. What will happen in that action is not before this committee, nor for me to

speculate, but nevertheless, in the course of that action, I found some very interesting documents in the files of the FBI that were produced.

For example, there is one document at the time they are getting ready to propose a plan to destroy 40 to 70 percent of their files—documents which I have a copy of here, I'll be glad to make them available to the committee—which indicates that in order to avoid compliance with the FOIA, documents would be destroyed. They would no longer have to make any search, they would no longer have to give any reason for not producing, they would not have to do anything but say we have no file, and that would be it.

Mr. EDWARDS. Without objection, the document will be made a part of the record.

[The information follows:]

MARCH 20, 1973.

U.S. GOVERNMENT MEMORANDUM

To: Mr. Marshall.

From: P. F. O'Connell.

Subject: Proposed destruction of files in the 100 (INTERNAL SECURITY) and 105 (INTERNAL SECURITY MATTERS) classification containing valueless file material by the Records Disposal Committee, Files and Communications Division.

The purpose of this memorandum is to recommend the destruction of files in the 100 (Internal Security) and 105 (Internal Security or Security Matters—Nationalistic Tendencies other than Domestic) Classifications containing record material which no longer possess sufficient historical, investigative, intelligence, and reference value to merit retention.

The Records Disposal Committee, Files and Communications Division, conducted a survey of our records holdings in the 100 and 105 Classifications which revealed that files over 25 years old occupy 585 six drawer cabinets (100's occupy 565 cabinets and 105's occupy 20 cabinets). A cross section analysis of these files revealed that cases occupying approximately 350 cabinets relate to alleged Espionage, Sedition, Sabotage, Hatch Act, and Internal Security Violations as well as alleged subversive activity, subversive tendencies, sympathizers, members of subversive organizations, suspicious activities, recipient of funds from foreign sources and miscellaneous matters in which no violations are present and the allegations were unfounded.

Also numerous files in the 100 Classification were opened on outgoing letters to Field Offices based upon excerpts from other Bureau files pertaining to subscribers to the Daily Worker or publications of a similar nature and/or alleged membership in or affiliation with subversive organizations. No further correspondence appears in these files, therefore, all information will be available in the original Bureau case file after these are destroyed.

Files, which will be considered for destruction, contain valueless information comprised principally of initial correspondence, and preliminary reports or letters. They were opened based upon rumor, personal grievances, suspicions, nonspecific allegations, nebulous information or foreign publications mostly during World War II, for record or informational purposes. All of this material has been extensively de-indexed and filed which will be destroyed do not contain any information reflecting unfavorably upon the character, loyalty or associates of the subjects in the title or persons named therein. Approximately 350 six drawer file cabinets of badly needed filing space will be reclaimed. The destruction of these files will be handled on a most selective basis by experienced Records Branch Personnel and will in no way adversely affect the Bureau's operations or its responsibilities in the Name Check field.

The proposed destruction will include material in the 100-0 general file and in the 100-0 Sub A file, where applicable. Archival Authority is required for the destruction of original record material and will be requested by separate memorandum.

It is noted that this proposal is very similar in nature to a recent proposal involving files in the 65 (Espionage) Classification, which was approved by the Bureau in memorandum P. F. O'Connell to Mr. Marshall dated 8/11/72. Archival Authority was granted on 9/12/72 for the destruction of the valueless Espionage file material.

It is recommended that this proposal be referred to the Intelligence Division for its evaluation and comments.

**Recommendation:** That approval be granted for the destruction of files in the 100 and 105 classifications in accordance with the above guidelines in cases over 25 years old. If approved, appropriate Archival Authority will be obtained.

**ADDENDUM INTELLIGENCE DIVISION, APRIL 3, 1973**

Attached to this Addendum is a list furnished by the Files and Communications Division of the files being considered for destruction. A review was made of a random sampling of these files (those checked in red on the list; one of each general type; total of thirty files). The sample review bears out the conclusion of the Files and Communications Division that these files have no apparent historical, investigative, intelligence or reference value which would merit their retention. The Intelligence Division concurs in the recommendation of the Files and Communications Division that such files be destroyed after receipt of Archival authorization for such disposal, provided that each and every file to be destroyed is first individually reviewed by experienced Records Branch personnel to ensure they meet the destruction criteria and that their destruction will in no way adversely affect the Bureau's operations or its responsibilities in the name check or security field. It is recommended however, that General Investigative Division (Name Check Section) concurrence be also obtained.

Attachment.

**U.S. GOVERNMENT MEMORANDUM**

**JUNE 7, 1976.**

**To:** Mr. Jenkins.  
**From:** A. J. Decker, Jr.  
**Subject:** Destruction of FBI files.

**PURPOSE**

The purpose of this memorandum is to: (1) set forth basic data regarding the Bureau's Records Management Program as it relates to the creation and disposition of records, (2) explore the possibility of changing the retention period for all FBIHQ files, and the impact this would have on FBI operations and responsibilities, and (3) determine from all FBIHQ Divisions if justification can be advanced for the retention of FBIHQ files beyond certain time periods.

**SYNOPSIS**

It now appears timely for the Bureau to reevaluate requirements for the retention of file material at FBIHQ beyond certain specified time periods and to consider the retention period of 10 or 20 years after a case has been closed. The Bureau has not previously sought destruction of investigative records of substance at FBIHQ on the basis they were needed for reference in connection with investigative and administrative needs and to satisfy requirements under Executive Order (EO) 10450. There is no legal requirement to maintain files for a specific period of time in connection with EO 10450 and it may be reasonable to assume that a 10 year retention period would account for all records that are relevant and timely. Additionally, the National Archives and Records Service (NARS) placed an indefinite retention period on all basic violation categories because of their historical significance. NARS is now reluctant to accession records in large volume due to complications encountered as a result of the Freedom of Information and Privacy Acts and records they previously felt should be retained for historical reasons are now being reevaluated since they would be responsible for responding to requests if they took custody of the records. FBIHQ's continuing need for these records should now be reevaluated since a short retention period would have a significant impact on many operations, such as: (1) burdens in handling responses to Freedom of Information and Privacy Act requests, (2) reduction in the staff at FBIHQ, resulting from less records to maintain and review, and (3) result in significant savings in space.

**RECOMMENDATION**

Any Assistant Director desiring to comment relative to the 10 or 20 year retention plan should submit their comments to the Records Management Division by close of business 7/1/76. The Records Management Division will then correlate this data for presentation to NARS for approval.

## DETAILS

The Bureau's Records Management Program is in accordance with Title 44 of the United States Code and Title 41 of the Code of Federal Regulations. The National Archives and Records Service (NARS), in connection with their Records Management Evaluation Program established in 1969 a Records Retention Plan for FBI records and in doing so noted that "... Ordinarily the records of a Federal Agency that are worthy of permanent retention amount to a rather small percentage of the total volume of records generated. Many of the records produced by the FBI relate to a number of controversial, if not important, aspects of history of the United States, particularly the role of the Federal Government in its relation to its citizens. Many years will pass before these records can be made available to the public for historical and other serious research. Nevertheless, the Archival value of these records will not decrease, nor will interest in them dissipate." Accordingly, in connection with the Records Retention Plan, NARS placed an indefinite retention period on most of our basic violation categories.

The Bureau has traditionally taken the position that FBI records support the Bureau's investigative and administrative needs and its obligation to act as a clearinghouse under Executive Order (EO) 10450 regarding the security of Government employees. Accordingly, in support of this need, the destruction of investigative records of substance at FBIHQ has not been sought.

In addition to the approved destruction of various types of administrative, applicant, and correspondence files, destruction of FBI investigative matters has generally applied in the following categories: (a) cases in which there was no prosecutive action undertaken, (b) perpetrators of violations not developed during the investigation, and (c) investigations that revealed allegations were unsubstantiated or not within the investigative jurisdiction of the FBI. Destruction has also applied to laboratory examinations other than FBI cases in which positive identifications were not made. In these categories reference to the original material does not exist.

In investigative matters of substance, microfilmed copies or summaries of substance are retained. For example, destruction has applied to: (a) FBI closed criminal matters over 10 years old after it has been determined that microphotographic copies are satisfactory duplicates of original material, (b) closed field files after reports or summaries of substance have been forwarded to FBIHQ, and (c) duplicate or extra copies of record material.

#### *Statutory requirements*

Title 44 of the United States Code and Title 41 of the Code of Federal Regulations (CFR) set forth statutory requirements regarding the creation, maintenance, use, and disposition of Federal records. There is attached an enclosure with pertinent excerpts from Title 41 CFR relating to the creation and disposition of records. Basically these regulations require that records be made and preserved to show adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency which will furnish information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

These regulations also require that routine paperwork be kept to a minimum and that the accumulation of unnecessary files be prevented. Effective techniques should be applied to minimize duplicate files and the disposal without filing of transitory material that has no value for record purposes. The Agency's Records Control Schedule should provide for the disposition of all records and prevent retention of records beyond the period during which they may serve a useful purpose.

#### *Current NARS policy*

A representative from NARS in a recent discussion regarding records expressed reluctance on the part of Archives to accession additional records in large volume due to complications encountered as a result of the Freedom of Information and Privacy Acts. The NARS representative noted that Government agencies were requesting reductions for retention periods in established Records Control Schedules because of the burden of these Acts. Accordingly, many records which NARS previously felt should be retained because of their historical significance are not receiving the same interpretation today because of the complications and burdens of these Acts.

According to the current Records Retention Plan approved by NARS, there are many categories of records the FBI is prohibited from destroying and once it is determined the records no longer serve a useful purpose for FBI responsibilities, the Bureau would be obligated to forward them to NARS for permanent retention because of their historical value. Other records we have that are not included in the Records Retention Plan may be offered for destruction once they are no longer needed by the Bureau. However, NARS can exercise their option to retain the records if they believe they contain historical significance.

This position is now subject to reevaluation and there is an indication that NARS will not be interested in obtaining the many categories of records that were initially listed in the Records Retention Plan for historical reasons because of the burdens and complications of the Freedom of Information and Privacy Acts. That is, once they took custody of the records they would be responsible to respond to requests. They most likely would now authorize the destruction of these records once the Bureau determined they no longer serve a useful purpose. Perhaps there would be exceptions for certain major cases with historical significance such as the Lindbergh kidnaping case, and it may be necessary to retain a representative sample of investigative matters in selected classifications.

#### *Current use of records*

In connection with the study of automation applied to Bureau records, it is interesting to note that recent surveys show that 77 percent of all index searching requests are satisfied with references that have been established since 1956. In other words, this is material established in the last 20 years. The General Index contains approximately 59 million index references, however, 13 million references satisfy 77 percent of FBIHQ searching requirement. We currently have about 7 thousand file cabinets of file material and about half of them pertain to material generated in the past 20 years. About 15 hundred cabinets, or 20 percent of the total, relate to material generated within the past 10 years. Enclosed is a chart showing the volume of file material related to certain years in terms of 6 drawer file cabinets.

#### OBSERVATIONS

It appears it is now timely for the Bureau to reevaluate requirements and justification for the retention of file material at FBIHQ beyond certain specified time periods. It is noted that the retention for field files (Office of Origin), after the case has been closed, is 10 years. This has previously been acceptable to NARS on the basis that FBIHQ maintained the record copy or summary of substance of all pertinent investigative matters. The indefinite retention period for files at FBIHQ, in addition to the NARS Records Retention Plan, is based on the fact they are needed for reference purposes in accordance with the Bureau's basic investigative obligations and EO 10450. It is noted that this Executive Order has no reference as to how long investigative material must be maintained. Therefore, it is believed that retaining only information that is necessarily relevant and timely would be in compliance with this order and it would be reasonable to assume that a 10 year retention period would fulfill this requirement. The current standards for file review require consideration of the applicant or employee's entire adult life. This review criteria vis-a-vis EO 10450 would be impeded by the destruction of records covering a person's adulthood, which may thereafter become the subject of a name check request. However, this problem has been discussed with the Department and we have been informed that in view of the sensitivity of the Congress and the Executive Branch to curtail certain record retention, it might be necessary to rewrite EO 10450.

It might be reasoned that information in our closed files more than 20 years old except in certain situations would be of little value unless it is also supported by current information. It may be further reasoned that the retention period of 10 years for our files could be considered since the field, from an investigative point of view, can satisfy their basic responsibilities with this type of criteria. A retention period of 10 or 20 years for FBIHQ files (except for certain individual files that were deemed to have a continuing value even though the case has been closed for more than a 10 or 20 year period) would have a very significant impact on FBIHQ operations. For example: (1) the burdens under the Freedom of Information and Privacy Acts would be greatly diminished if we did not have our current large volume of file material to give out, (2) the large maintenance staff (1,150 employees) in the Records Section would not be needed to maintain and service a smaller file holding, (3) the continuing need for a large staff for other FBIHQ Divisions would diminish considerably because there would no longer be available a large amount of files to review, (4) space saved in filing cabinets

alone could amount to cover 35,000 square feet if a 10 year retention period was adopted, and (5) there would be a considerable impact and savings on many other related functions if a short (10 year) retention period was adopted, such as eliminating the need to microfilm old records and additional space savings as a result of curtailing other activities.

Accordingly, it is being recommended that each FBIHQ Division review this material in detail and provide justification for the retention of files in their respective areas of responsibility for periods beyond 10 and 20 years or to suggest other retention periods. Of particular importance will be for the General Investigative Division to reexamine the requirements under the Name Check program and for the Special Investigative Division to reexamine the requirements for the Security of Government Employees currently being handled by the Employees Security and Special Inquiry Section. Additionally, consideration must be given for the need of references to criminal and security cases more than 10 or 20 years old.

Prior to year	Year from 1976	Comparison: 1976 to prior year			Floor space comparison	
		Total prior year Cabinet total	Percent of 1976 full	Difference	Utilization of floor space by prior years	Difference
1976.....	0	7,000	100	0	45,000	0
1970.....	6	6,497	93	503	41,850	3,150
1966.....	10	5,531	79	1,469	35,550	9,450
1961.....	15	4,464	64	2,536	28,800	16,200
1956.....	20	3,573	51	3,427	22,950	22,050
1951.....	25	2,698	39	4,302	17,550	27,450
1946.....	30	1,680	24	5,320	10,800	34,200

#### U.S. GOVERNMENT, MEMORANDUM

AUGUST 2, 1976.

To: Mr. Jenkins.  
From: A. J. Decker, Jr.  
Subject: Destruction of FBI files.

#### PURPOSE

The purpose of this memorandum is to: (1) set forth the responses by other FBIHQ Divisions relative to my memorandum regarding captioned matter dated 6/7/76, (2) propose a new searching criteria of 20 years as a result of the basic analysis from these responses, and (3) set forth observations and recommendations of the destruction of certain categories of file material based upon the responses received from the substantive divisions.

#### SYNOPSIS

FBIHQ Divisions have provided a response regarding the destruction of file material relating to their respective areas of responsibility. Generally it is agreed that certain administrative files relating to policy, contracts, etc. should be maintained because they document various policies and procedures regarding the transaction of public business and are needed for future reference to protect the financial and legal rights of the Government. Additionally, policy files relating to various investigative matters, organizational files, certain major cases, and those files that have historical significance should be maintained. However, the various divisions indicate there are areas where a more realistic retention period could be established for investigative files and that obsolete material should be destroyed. Generally, files in criminal categories could be considered for destruction after they are 10 years old. Because of social-political factors, files relating to World War II activities could be considered for destruction. Files relating to internal security-extremist matters without foreign involvement such as Klan, Minutemen, Nation of Islam, Black Panther Party, antiriot and bombing matters could be considered for destruction after they are 10 years old. Certain organized crime files could be considered for destruction on a 10 or 20 year basis. The criteria regarding these matters must be more fully defined and developed in order to more readily identify obsolete material that can be considered for destruction. Generally, there was little or no need advanced for material more than 20 years old and, therefore, a new searching criteria is being proposed that would limit all FBIHQ searching to file material established from 1956 or within the past 20 years. A 20

year searching criteria, except for FOIPA matters and where specifically requested otherwise, would greatly streamline name searching and file review functions and could result in some immediate economies in the range of 50 employees or an approximate amount of \$400,000 per year. Each FBIHQ Division is being requested to respond to the proposed 20 year searching criteria and to provide data that would be helpful to more specifically define and establish a criteria for file destruction in order that positive steps can be taken at the earliest possible time to seek the destruction of obsolete material from our files.

#### RECOMMENDATIONS

1. That each FBIHQ Division review this memorandum in detail to determine if a 20 year searching criteria can be established as set forth in the Details. You should direct your response to the Records Management Division by September 1, 1976, regarding this matter.

2. The substantive FBIHQ Divisions should review the material in this memorandum carefully to determine if the criteria for the destruction of obsolete file material in various categories can be more clearly defined so additional positive steps can be taken to seek its destruction. You should provide your response regarding this matter to the Records Management Division by September 1, 1976.

#### DETAILS

##### *Responses by all FBIHQ divisions relative to file destruction*

My memorandum of 6/7/76 proposed that each FBIHQ Division submit justification for the retention of files in their respective areas of responsibility for periods beyond 10 and 20 years or to suggest other retention periods. The substantive divisions basically involved include Division V, the Intelligence Division; Division VI, the General Investigative Division; and Division IX, the Special Investigative Division. Other divisions also provide comments relative to this matter. Summaries of the comments from nonsubstantive divisions that have responded to this matter follow.

##### *II Training Division*

The Training Division suggested that the field be canvassed and consulted on the value of investigative files beyond a 10 or 20 year retention period.

##### *XI Legal Counsel Division*

The Legal Counsel Division questions the wisdom of destroying background investigations or counterintelligence files in 10 years or less. To do so denies the intelligence value of the information and undermines the Bureau's position with regard to the need for such investigations.

##### *XII Administrative Services Division*

The Administrative Services Division defers to the user divisions the disposition of investigative records. They indicate there are certain administrative files relating to policy, contracts, etc. that should be kept for longer than a 10 or 20 year period because it documents various policies and procedures regarding the transaction of public business and might be needed for future reference to protect the financial, legal, and other rights of the Government.

Comments from the substantive divisions who have the direct responsibility for investigative matter are listed below in the detail in which they were provided.

The following are the comments of Division V, the Intelligence Division.

The Intelligence Division concurs with the Records Management Division contention, as set forth in memorandum to Mr. Jenkins from A. J. Decker, Jr., dated 6/7/76 that a current reevaluation of retention requirements of FBI file material is warranted. In addition to increasingly prohibited cost factors, our present indefinite retention of insignificant and less significant file material at FBIHQ deters our ability to readily extract and utilize file material relevant to our current investigative and intelligence responsibilities. While the Intelligence Division generally supports the concept of systematic destruction of certain categories of files after periods of specified retention, the comments and suggestions set forth herein relate only to files/records within the purview of the Intelligence Division as it relates to its investigative/intelligence responsibilities.

It should be noted in the instances of criminal-type substantial investigations customarily the period of file retention commences when the case is administratively closed. In the area of internal security/counterintelligence responsibilities, where investigations are frequently of an open end case with future analytical value, the retention period should be measured from the date of the last filed material recording relevant activity. It should be pointed out there are instances where files have been opened to administer or record intelligence-type material for over 30 years and these files are still utilized.

**Policy files.**—Current experience with Congressional investigative and oversight committees has demonstrated the necessity of indefinite retention of policy material such as that dealing with statutory interpretations, executive orders and directives, Department instruction jurisdiction, certain liaison matters, particularly relating to internal security/extremist/counterintelligence investigations. This material must continue to be indefinitely maintained and where practical it should be segregated from files primarily regarding substantive investigations.

**Material of historical significance.**—The retention of material based on its possible future historical value is basically a judgment decision, subject to critical hindsight. However, files relating to notorious individuals and highly publicized investigations (the Silvermaster ring, Rosenberg case, Hiss case, Colonel Abel investigation, certain Communist Party leaders such as William Z. Foster and Elizabeth Gurley Flynn), outlining unique or unorthodox investigative/counterintelligence techniques and those relating to key sources, defectors, illegals, intelligence personalities, should be indefinitely retained. In addition to the possible future need of this material for analytical research purposes, files of this nature regularly contain information of a policy and historical significance.

**Termination of intelligence significance.**—Social-political factors may alleviate the need for the retention of specific files in whole areas of foreign intelligence interest. For example, with few exceptions, almost all the extensive FBI files holdings on World War II German-American, Japanese-American, Nazi, Bund, Custodian Detention and Alien Control matters, could be immediately destroyed without harm to our ongoing or future intelligence needs. Also, excepting those of historical interest, files relating to our investigative/intelligence interests in South America and Central America during World War II (Special Investigative Services) could be destroyed based upon the radically altered social/political alignments.

On the other hand, many of our files dealing with personalities and organizations concerned with Soviet intelligence activities are vital to our analytical intelligence needs as long as the Soviet bloc presents a military-economic-political intelligence threat to our internal security interests.

**Files on individuals.**—As regards the internal security-counterintelligence areas, files on individuals may be divided into three basic categories for retention purposes.

1. Investigations where derogatory information was not developed or insignificant to warrant expanded investigative scrutiny (destroy in five years), except in foreign counterintelligence matters (destroy in 20 years).

2. Investigations where derogatory information has been developed but not deemed of prosecutive or continuing intelligence need (would include rank-and-file members of subversive/extremist groups) (destroy in 10 years).

3. Investigations with significant prosecutive or ongoing intelligence interest. These would include top functionaries and activist of certain subversive/extremist groups (destroy after 20 years or longer if any indication of historical or future analytical value). Known and suspected intelligence officers and important intelligence agents should be retained indefinitely.

It is believed a policy should be developed whereby significant information relating to subversive/extremist involvement of individuals could be, where practical, incorporated into organizational or topical files so appropriate indexing may be effected to meet future possible requirements under Executive Order 10450 (Security-loyalty matters).

**Organizational files.**—Excepting instances where derogatory information is lacking or not confirmed, our files on subversive/extremist organizations and organizations of foreign counterintelligence interest should be retained for a period of 20 years and longer in the event they are deemed to have historical or future analytical value.

**Informant, source, asset files.**—Where an individual is considered for informant, source, asset use and subsequently not used or used on a restrictive basis, it is suggested the file be retained for only 10 years, unless unusual circumstances dictate otherwise.

**Internal security/extremist files without foreign involvement.**—Organizational and individual investigative or intelligence files relating to such transitory organizations as the Klan, Minutemen, Nation of Islam, Black Panther Party, etc., may logically be destroyed 10 years after the last reported relevant activity. Also included in the 10-year category for destruction would be such investigations as those relating to antiriot and bombing matters and Espionage-X cases, unless circumstances dictate otherwise.

It is suggested the Records Management Division consider establishing a system whereby file covers may be appropriately flagged to indicate proposed

category of destruction and, where appropriate, the date of destruction. Such a system could be supported by a card file index which would insure systematic review and destruction of files within specific categories at the termination of appropriate retention dates.

The following are the comments of Division VI, the General Investigative Division:

The Records Management Division has requested our comments concerning retention periods for all FBIHQ files and impact this would have on FBI operations and responsibilities. Each Section in the General Investigative Division has reviewed and Name Check and Civil Rights Sections believe 20 year retention period is necessary for them to carry out their supervisory responsibilities.

Name Check Section had the following comments:

The FBI Headquarters' filing system originated and developed over the years based upon the concept that a strong central records system adequately indexed for full and facile retrievability of pertinent information (mostly indicating criminal, subversive or suitability factors) would assist the Government in maintaining the internal security of the nation, assist in solving crimes perpetrated by repeat offenders, and avoid situations where persons of unsavory or disreputable backgrounds could work their way into positions of trust with the Government. This American was rather fixed; that is, a person was born, educated and employed in a somewhat confined area, in most instances within the same state or geographic region. As society and living standards have developed, the shiftability or mobility of the average American has increased tremendously and with it, the changing of names, mores and other factors which would identify an individual with prior unfavorable information. Inasmuch as the question of identity is left begging in many instances, that is, in the absence of fingerprints, the FBI's practice of having volumes filled with old, perhaps outdated, data has really outlived itself due to the changes mentioned above. Accordingly, the name check program does not need information more than 20 years old assuming the period of a person's life between 20 and 40 years is the normal "make or break" stage, that is, the person is during this period well on the way to success or well seasoned as a criminal or subversive threat. Conversely, the files should be maintained for at least 20 years in order to be meaningful.

Accounting and Fraud and Criminal Sections of the General Investigative Division believe a 10 year destruction policy will be appropriate as it concerns handling of violations supervised by those Sections. They note that seldom, if ever, are our files over 10 years old meaningful as it concerns a criminal violation and believe their supervisory responsibilities to be appropriately handled with a retention policy of at least 10 years.

As it concerns individual major FBI investigations, the General Investigative Division believes the Substantive Division handling investigation should have the opportunity to decide whether or not that particular major investigative file should be destroyed when the destruction period arrives. We suggest the Records Management Division query Substantive FIBHQ Division as it concerns these major FBI investigations prior to destruction.

The following are the comments of Division IX, the Special Investigative Division:

The establishment of short retention periods for Bureau files because of the burdens of processing FOIA and PA requests invites the conclusion that short retention periods have a primary purpose of avoiding the intent of these statutes. Moreover, a short retention period would hamper the FBI in its ability to defend itself against unjust criticism and lawsuit in that we would be without the evidence to support our objectivity. Such criticisms have already been raised as our files have been opened to requesters. The first letter sent to a requester informing that due to our short retention, we have destroyed information about him might be expected to result in legislation establishing a 30, 40 or 50-year program of retention of files.

The Department of Justice is currently studying retention guidelines and there are specific retention guidelines set forth in several other areas. Our efforts to define retention periods must be consistent with these other guidelines.

For example, the PA, Section (C)(2) states that an accurate accounting of disclosure of a record must be retained for at least five years or the life of the record whichever is longer. Further, the latest (May, 1976) proposed revision of EO 10450 in Section 7(j) states that reinvestigations of incumbents in positions of special trust may be conducted every five years. This proposed revision would also set forth standards for the control, release, use, and retention of reports (Section 13). Also, the Attorney General's Guidelines for FBI Information Gathering and

Retention Policies sets forth proposed standards for the collection and retention of information. The several proposed drafts of these guidelines also deal with our background investigations for Congressional and Judicial positions and the retention of reports resulting from these investigations. We have furnished several memoranda to the Department concerning these guidelines, i.e. Cleveland to Adams memorandum dated 9/15/75; McDermott to Jenkins dated 9/8/75. We are now preparing an agreement to conduct background investigations for the Senate Select Committee on Intelligence. This agreement would set forth standards for the dissemination and retention of reports of background investigations.

In view of these varying standards and the need to insure that our consideration of retention periods covers the above situations and other possibilities, reevaluation should include consideration of these several areas.

A short-term retention policy of 10 or 20 years is feasible only as it can be effectively shown that information beyond those years is of little or no value, a demonstration which has not yet been made. Our files are unique and singular and contain information which would not exist elsewhere. If destroyed it could be irretrievable. The study cited revealed that 77 percent of searching requirements are met from file data since 1956. A 23 percent utilization rate data over 20 years old is not insignificant and without a clearer demonstration such data possesses little or no utility, valuable data could be lost forever. No amount of saved square footage could compensate for destroyed information which could be pertinent to a current investigation.

The ten-year destruction program in the field affords little basis for justifying a shorter retention plan for FBIHQ since the field program is based on the availability of data at FBIHQ. To destroy FBIHQ files would undermine the basis for the field destruction program.

While aspects of FOIA/PA may be oppressive at the moment, this situation could abate considerably once controversial file reviews are settled. It is important that we not allow what may be short-term considerations to generate policies which may disadvantage the long-term investigative responsibilities of the Bureau.

While personnel savings may result, a short-term program should be defensible and justifiable on its own merits and any ancillary benefits should devolve from a sound policy and not form a basis for determining that policy. Furthermore, little personnel savings can be expected in other divisions since they are essentially engaged in managing current investigative activity and not in processing data over 20 years old.

As to organized crime files, in general, either a 10- or 20-year retention period for both substantive and nonsubstantive matters currently handled by this section is acceptable and cannot be foreseen as having a detrimental impact on future FBI operations. Certain nonsubstantive 92-AR biographical data on top hoodlums, trace the origins and development of organized crime in America, or represent the historical value and should be retained indefinitely. The Organized Crime Section believes that prior to their destruction nonsubstantive 92 files should be evaluated by this section to determine whether or not they should in fact be destroyed.

#### *Proposed searching criteria*

There is attached as an enclosure an analysis of FBIHQ searching requirements based on current criteria. This shows that name check requests account for over 90 percent of searching that applies to records more than 20 years old. This chart also indicates that 77 percent of all index searching requests are satisfied with references that have been established since 1956. In other words, this is material established in the last 20 years. The General Index contains approximately 59 million index references, however, 13 million references satisfy 77 percent of FBIHQ searching requirements. About one half of our 7,000 file cabinets of material pertain to files generated in the past 20 years.

In connection with the Name Check Program under Executive Order (EO) 10450, our surveys show that over 40 percent of the references that are listed under our current criteria pertain to files that were opened prior to 1956 files that are more than 20 years old. It is our current practice to list all references that might pertain to the individual being searched, irrespective of the age of the file material.

An analysis of responses provided by FBIHQ Divisions regarding the retention of files in their respective areas of responsibility generally indicate there is little need for file material more than 20 years old. Exceptions would include files relating to policy matters, major cases and files of historical significance, certain organizational files, etc. Accordingly, it now appears timely to consider positive steps to adjust searching criteria for most FBIHQ matters, particularly as it relates to the Name Check Program since this program accounts for about 70 percent of all

searching. This will be a significant step regarding the use of FBIHQ records, results in immediate economies, and serve as a guide in our continuing analysis of the value of retaining certain file material beyond a 20 year period.

It is, therefore, being proposed that all FBIHQ searching (except for FOIPA matters) be limited to file material generated within the past 20 years or since 1956. Index references prior to this time would not be considered in any searching requests unless there is a specific request to include material prior to that time.

This means that all searching would be limited to only 13 million cards in our index as opposed to the total 59 million. This should considerably expedite all searching since employees could arbitrarily eliminate all cards dated prior to 1956. This will also have a significant impact on the file review operation and will eliminate about 40 percent of the references now being reviewed. The total effect this would have to contribute to a more efficient operation can only be estimated. However, from the total amount of employees now involved in the searching and review operations it is estimated that the savings over a period of time with this type of searching criteria could amount to about 50 employees. Using an average of a GS-4, or about \$8,000 per year per employee, the savings could amount to about \$400,000 per year.

A further analysis of the responses by the various divisions indicates that in certain categories searching could be limited to material within the past 10 years. There are many subtleties involved and this would have to be carefully defined on a classification basis.

*Observations regarding the destruction of certain categories of file material*

The Intelligence Division advised that because of changing social-political factors, most investigative cases could be destroyed relating to World War II German-Americans, Japanese-Americans, Nazi, Bund, etc. without harm to ongoing or future intelligence needs. Also, files relating to investigative intelligence interests in South and Central America during World War II (SIS) could be destroyed, except for those that would be of historical interest. Accordingly, an effort will be made to determine if files in these categories can be readily identified so the necessary steps can be taken to seek their destruction.

The Intelligence Division also indicated that internal security-extremist files without foreign involvement relating to the Klan, Minutemen, Nation of Islam, and Black Panther Party may logically be destroyed 10 years after the last report of relevant activity. Antiriot and bombing matters could also be included in this category. Accordingly, efforts will be made to determine if files in these categories can be readily identified in order that proper steps can be taken to seek their destruction.

DECEMBER 22, 1976.

To: NNFL, NNF.

From: Mary Walton Livingston.

Subject: FBI records, draft schedule.

Henry Wolfinger, NCD, asked NNFL for its views on the schedule proposed for FBI records, with particular reference to the 6 million investigative case files dating from the mid-twenties to the present. The FBI proposes to retain its investigations on the security of Government employees as long as needed for administrative purposes as well as other files in which litigation is pending and proposes guidelines for selecting the "significant" cases for permanent retention. The rest of the case files are to be disposed of in periods from 5 to 20 years.

The criteria recommended by the FBI for determining which cases are significant are broadly defined as (a) those having a legal impact on statutes, rules or regulations or law enforcement policies; (b) those related to an actual or potential breakdown of public order (civil disturbance); and (c) cases in which there has been an expression of public interest by a Congressional Committee or the Executive Office of the President or cases receiving a high degree of attention from the national media. Mr. Wolfinger has recommended two additional criteria, namely: cases involving "a dissident or subversive organization . . . or persons holding a major leadership position within such an organization," and cases directly involving a "person, element, or organization whose activities are deemed to pose a substantive and compelling threat to the conduct of national defense or foreign policy."

The FBI criteria are so broad that many if not all of the cases in the area of internal security-and counter-intelligence will be covered as such cases have a legal impact on statutes, rules or regulations, or law enforcement policies, may relate to breakdowns of public order, or be of public interest. Famous cases, such as the Lindbergh Kidnapping, are included under the category of public interest.

As the FBI will make the selection, NARS will presumably not know what cases have been selected until years later when they are accessioned. By then, the other cases and the index cards to them will have been destroyed so that no check can be made as to whether certain criteria were followed. NARS could propose that entire file classifications be made permanent, but this would produce a volume of records that would be very large to store and taken as a whole would present forbidding research problems. On the whole I have no objections to the FBI criteria, nor to the two additions by Henry Wolfinger: cases involving a "dissident" or subversive organization and cases involving person or organization deemed a compelling threat to national defense. (However, I believe the word "dissident" does not fairly describe some of the organizations he wants to cover.) If the particular Wolfinger criteria are added, however, I believe we should add others such as major cases relating to organized crime and to violations of civil rights.

As the selection of cases for permanent retention will depend almost entirely (i.e. except for a few, famous name cases), on FBI judgment, I believe NNFL should give close attention to the length of time other case files are retained. (A separate memo is attached on the conflicting views on this subject.)

The FBI cases are records in which the public is now showing a great interest. Private citizens and private organizations are requesting copies of records concerning individuals or groups under the Freedom of Information Act. FBI records officials recently cited the volume of these requests as a reason for disposing of case files, stating that disposal "could also reduce the costs and burdens involved in FOI/PA obligations" (undated FBI memo, received by NNFL from NCD, December 1976).

Two groups seeking access to FBI files with a view to seeing whether their legal rights as citizens were violated have been the subject of news stories, as follows:

1. About 200 members of the Student Non-violent Coordinating Committee, dormant since 1963, voted in November, 1976, to file suit to seek information from FBI files under FOIA, Julian Bond, their former publicity director, stated they are filing the suit because they believe that "if it had not been for agent provocateurs, the organization might be alive today." (Washington Post, November 8, 1976)

2. The Black Panther Party filed a \$100 million class action suit in December, 1976, against present and former officials of the FBI and other Government officials charging them with actions since 1957 to destroy the party and its members. The purpose of the suit, according to the chairman, Elaine Brown, is to expose "the most extreme and violent actions employed by high government officials against citizens of this nation." (Washington Post, Dec. 2, 1976)

The Justice Department is pursuing an investigation of some FBI activities through a Federal grand jury in New York City, now in its ninth month. (Washington Star, December 12, 1976.)

The United States Senate showed its interest in the FBI's security case files by passing Senate Resolution 21, 94th Congress, January 21, 1975. This called for a moratorium on destruction cases relating to domestic intelligence and to extremist, racial, and foreign counterintelligence. The moratorium is due to expire upon the expiration of the 94th Congress. FBI records officers, who recognize the moratorium as still in effect in December 1976, state in their unsigned memorandum that the "general retention of these files will be 20 years upon the conclusion of the moratorium (FBI memo p. 5). Presumably the 20 years will be calculated from the date the files were closed, not from the date the moratorium ends.

In view of the interest expressed by the public in making FOIA requests, by groups filing court actions, and by the U.S. Senate, the retention period for the FBI case files not selected for permanent retention should be a matter of real concern to NARS. As proposed by the FBI, the retention period for case files ranges from 5 to 20 years. In general, case files in the security classifications of domestic intelligence, extremist, racial, and foreign counterintelligence will be disposed of in 20 years and in criminal classifications in 10 years.

There are exceptions, however, to the 20-year retention period for domestic intelligence and foreign counterintelligence (FBI memo, p. 4), as follows:

- Item 4.A. Investigations in which derogatory information was not developed or was so insignificant as not to "warrant expanded investigative scrutiny", are to be disposed of in 5 years.

4. B. Investigations where derogatory information was developed but not deemed of prosecutive or continuing intelligence value, such as rank and file members of subversive/extremist groups files are to be kept for 10 years.

7. Internal Security/Extremist Files Without Foreign Involvement: Individual investigative or intelligence files relating to membership in such "transitory

organizations" as the Ku Klux Klan, Minutemen, Nation of Islam, Black Panther Party, etc. (where no significant derogatory information is shown), and antiriot and bombing matter cases are to be kept for 10 years.

There is also an exception to the rule that all criminal cases be kept for 10 years. That is that civil rights cases are to be kept for only 5 years.

I believe that legal rights of individuals may well extend beyond the 5 or 10 year retention period for category 7. Only now are members of the Student Non-Violent Coordinating Committee, dormant since 1963, seeking information from FBI files on about 200 members. Civil litigation filed by the Black Panther party in December, 1976, against present and former officials of the FBI charges them with actions since 1967 to destroy the party and its members. This is a class action suit covering all its members. In both these instances, individual membership files would be relevant. If the proposed schedule had been in effect, those on Student Non-Violent Coordinating Committee members would have been destroyed by now.

Legal rights of individuals may also extend beyond 5 and 10 years in cases covered by categories 4.A. and 4.B., where nothing derogatory has been found or, where if found, no prosecution resulted. This is because individuals may want to obtain information from their files in order to see whether the FBI used unlawful methods—break-ins, etc.—in making the investigations.

The retention period for criminal cases—10 years except for civil rights cases which are to be kept for only 5 years—is minimal compared with the period recently approved for the records of the Bureau of Alcohol, Tobacco, and Firearms (BATF), of the Treasury Department. That schedule (NC10436-76-2), provides for a 50-year retention period for criminal case files and indexes and a 20-year retention period for progress records on the cases. NNFL has been given no information as to why the FBI proposes only a 5-year retention period for civil rights cases compared with the 10-year period for other criminal case files. It may be argued that files, if created by illegal means or even if they contain derogatory information legally obtained, should be destroyed as soon as possible. However, the Privacy Act is designed to guard against administrative misuse of such information.

I therefore recommend that disposal not be authorized for security case files designated 4.A, 4.B, and 7, or for criminal case files.

I further recommend that the Archivist, when he receives the FBI case schedule, request "advice and counsel" from the Committee on Rules and Administration of the Senate and the Committee on House Administration of the House of Representatives as authorized by law (44 USC 3303c). This would be in recognition of the fact that these particular records "may be of special interest to the Congress" and that consultation with the Congress regarding their disposal "is in the public interest."

MARY WALTON LIVINGSTON.

Enclosure.

GENERAL SERVICES ADMINISTRATION,  
NATIONAL ARCHIVES AND RECORDS SERVICE,  
Washington D.C., April 11, 1978.

Reply to attention of: NCD.

Subject: NARS review of records schedule for FBI field office investigative files.  
To: Assistant Archivist for Federal Records Centers—NC.

On April 6, 1978, ND informed me that he and N were in agreement with our proposal for reviewing the FBI schedule for field office investigative files. He said that we should construe his phone call as approval of our proposal.

He did suggest, however, that we incorporate into our proposal the following:

1. Review in detail each of the allegations contained in the newspaper and magazine reports forwarded to Judge Webster under cover of N's letter of March 28, 1978. I see no problem in examining these issues with FBI records management officials. ND agreed that our review of these allegations should not include such matters of FBI internal management as the operation of its FOIA system and procedures for "black bag" jobs and other illegal investigative activities.

2. Consider amending the present disposition instructions for field office investigative files in the light of criteria developed to designate FBI headquarters case files for permanent retention. Disposition Job No. NC1-65-77-2, still pending with Congress, contains criteria for designating headquarters case files for permanent retention. During our review, in comparing the content of field office and headquarters investigative files, we will request files for at least a few cases that appear to meet the proposed criteria for permanent retention. We then can determine whether any of the documentation in the field office files, considered in connection with the documentation in the headquarters files for the same cases, has sufficient

value on its own to warrant permanent retention. If so, ND believes that the FBI could develop procedures to insure that such documentation is forwarded to central office for incorporation into the headquarters case file prior to disposal of the field office file.

On April 6, 1978, I discussed our proposal for the review with Jim Awe, Chief of the FBI's Records System Section. He assured us of the cooperation of his staff, and we plan to meet this coming week to discuss specific arrangements for the conduct of our review.

On April 7, 1978, I responded to a phone call from John Rosenberg (phone: 525-2573), author of one of the articles that we forwarded to Judge Webster ("Catch in the Information Act," *Nation*, February 4, 1978). He inquired about the status of the FBI disposition request for headquarters case files. We discussed this matter as well as our plans for reviewing the schedule for field office investigative files. Rosenberg was pleased to learn of our review and suggested that NARS should select an advisory panel of historians to assist in the process (I politely disagreed with this suggestion). I have informed ND of this call from Rosenberg.

I notice that Ron Ostrow's article of March 13, 1978, in the *Los Angeles Times*, states that the Senate Judiciary Committee "plans to consider the proposed file destruction (i.e., of headquarters case files) next month at hearings on FBI investigative guidelines, with Senator Edward M. Kennedy (D-Mass.) as chairman." The testimony and comments developed during the hearings may be useful in our review.

CARMELITA S. RYAN  
(For Thomas W. Wadlow, Director,  
Records Disposition Division).

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AMERICAN HISTORICAL ASSOCIATION,  
*Washington, D.C., June 20, 1979.*

Mr. JAMES B. RHOADS,  
*Archivist of the United States,  
National Archives and Records Service, Washington, D.C.*

DEAR BURT: I write once again to express the association's deep concern about the policies and practices of NARS and the FBI in the preservation and disposition of FBI field office files.

As you know, I wrote to you over a year ago, on May 22, 1978, bringing to your attention complaints from association members of alleged unwarranted destruction of FBI field office records and "raised the more general issue of the intention of the FBI to destroy many of the old files deposited at its headquarters." At that time I noted that the association's committees realized that neither the National Archives nor any federal agency can preserve all of their records, "nonetheless, we are profoundly concerned that there may be some massive destruction of FBI records without their being thoroughly and professionally reviewed for their future historical value. I stress the word 'professionally,' for the selection of material to be retained should be the responsibility of trained archivists and historians, not untrained clerks or agents in the FBI."

In response to my letter of May 22, 1978, you informed me that "we [NARS] are undertaking an extensive review of these records [FBI investigative records] by the Director of the Records Disposition Division and two senior staff members to insure that our judgment concerning their lack of research value remains valid." We were, of course, pleased to receive this information and looked forward to the results of the study.

The Research Division of the association has recently reviewed the report: *Disposition of Federal Bureau of Investigation Field Office Investigative Files*, December, 1978, and while we applaud your willingness to conduct the study we are not satisfied with the conclusions, because we find nothing in it that assures us that the present system will prevent premature destruction of valuable historical materials; nor do we find in the study sufficient guarantee that the personnel determining the historical value of records subject to destruction are competent to make professional judgments. We believe that the study again points up the need for a review mechanism outside of NARS and the FBI (or other agencies; for the case of the FBI files is simply one example of a recurring problem) through which historians and other interested groups can be consulted and on which they have representatives.

If the present policies and practices of NARS and the FBI do not provide for such a mechanism, we urge that NARS take steps to create it.

In summary, I would very much appreciate your reply to the following questions:

1. What steps have been taken to insure that there will not be a repetition of the untimely destruction of FBI field office investigative files?
2. What schedules exist for approved or proposed destruction of FBI field office investigative files and FBI headquarters files? Would you please send to me any existing and future schedules?
3. What steps have been taken to insure that professionally qualified archivists and historians are involved in the process of evaluating FBI material to be destroyed?

I would appreciate an early answer to these inquiries so that I can share them with our members.

Yours sincerely,

MACK THOMPSON,  
*Executive Director.*

Mr. PERLIN. I have a document dated June 7, 1976, and I have another document dated August 2, 1976, both of the FBI.

The second one is very interesting, because putting aside the legal rights that are impaired, you have a body of work about which the historians and the archivists are very concerned. The organizations such as the Organization of American Historians, the American Historical Association, the Society of American Archivists, and their leading officials, are very concerned about the destruction of these files, and that the FBI is given the sole discretion to determine what is significant or valuable from an historical standpoint.

And here we have a document dated August 2, which says:

Because of social-political factors, files relating to World War II activities could be considered for destruction. Files relating to internal security-extremist matters, without foreign involvement, such as the Klan, the Minute Men, the Nation of Islam, the Black Panthers, anti-riot and bombing matters can be considered for destruction after they are 10 years old.

Putting aside what rights of people that may have been affected, whether they were members or victims of such organizations, the destruction of those files is destruction of files that cannot be found anywhere else.

Many of the organizations which are in the headlines today, last year, and 5 years from now, their records sometimes are very transitory and disorganized. The FBI is a good record collector. They collect not only their activities, but their materials and their propaganda, if you wish to call it that. This is material that relates to the social, historical, economic, and political history of our country.

There are files relating to trade union activities, activities that very well may have ended in the hands of employers. There are files of religious organizations, there are files reflecting media manipulation of every kind, from publishing houses to magazines to television.

Putting aside whether or not it's legal or illegal, these files show what was going on in our country, the Government's perspective, the FBI's perspective, as well as what was motivating people. These are files that must be preserved from an historical standpoint.

The other thing that is interesting is that since 1945, the FBI started on a plan of destroying first field office files, on the rationale that they were merely duplicative. In fact, the field office files, as the FBI has been compelled to admit under oath in depositions and in testimony, contain the vital store of all primary evidence.

Now they didn't destroy these files. They held these files and put a 25-year moratorium on their destruction, but once the Freedom of

Information Act was enacted, then immediately they started on a plan and a procedure, and have now been engaged in the destruction of millions of files.

And I must confess, after looking through these files, the very forms of unlawful, unconstitutional activity, the injury imposed upon hundreds of thousands of people, as a result of FBI activity, legal or illegal, these are files that cannot be destroyed. If we destroy them, then we deny the means of accountability. The FBI will once again in the future be engaging in the same sort of unlawful activity I think this committee or nobody in the United States would want to approve such a result.

Now, on the other hand, while it authorizes the vast destruction of files, this charter—in fact, 533(c)—authorizes the broadest dissemination of files to any police agency or investigative agency, State or local, as well as Federal. Even if the information contained therein was lawfully obtained, even if it came within the jurisdiction of the FBI but it didn't warrant dissemination or distribution, there's nothing that could be done about it. The FBI could destroy the file but this material would be in the hands of private as well as public agencies, because we do know that local police and State agencies do disseminate this information to private institutions, and do not limit it to police agencies alone.

So even if someone were to come in and commend the destruction of an FBI file, and that file were expunged or had already been destroyed, the harm would already have been done in disseminating information that was either inaccurate, false, or misleading, and which may have been unlawfully obtained.

We are dealing with a charter which authorizes covert operations. Information bearing upon this covert operations then could be disseminated, and there is no control whatsoever on how this information, which may be false, inaccurate, or illegally obtained, can be dealt with and there is no remedy that anyone would have.

Finally—and I have written not a brief statement, so I want to cut myself short as soon as possible—the two other aspects of it that I want to deal with, first of all, the files of the FBI; they acknowledge at least 50 percent of the files have nothing to do with criminal investigation under the Federal law.

They relate to matters of domestic intelligence, "subversion and counterintelligence." The search slips of the FBI have two categories, subversive and criminal. They are aware of the difference in their search slips, and these files which reflect investigative activity and covert activity on the part of the FBI, would be destroyed, and the FBI would be immune from accountability, and the citizenry would be denied the means of seeking redress if the files are destroyed.

Finally, on the question of informers and secrecy, under this statute or this charter, there would be the absolute total and unequivocal secrecy as to informers.

Now if informers are engaging in investigations and reporting on lawful activity protected by the first amendment and the other provisions of the Bill of Rights, and the informers are infiltrating organizations, disrupting organizations, acting as an agent provocateur, there would be no means for us to know.

Now I am not speculating because the files and the records of the FBI that I have examined reveal that they have done each and every one of these activities. They have broken in, they have had electronic informants placed—electronic bugs put in people's houses by informants, where the most intimate aspects of their life are recorded and reflected in FBI files.

There is—I don't want to take any more time in expanding the areas that might be encompassed in this prior history of illegal activity.

Finally, on the question of the Attorney General's guidelines and the immunity that it gives the FBI if they violate these guidelines, first of all, it will be within the prerogative of the Director and of the FBI and of the Attorney General to declare these guidelines, or any portions of them, secret, and you cannot have any means of determining and stopping unlawful operations, assure accountability, and due process, by police agencies, if the guidelines are not openly and publicly disclosed.

I'm not talking about investigative techniques, how to find a fingerprint, or those sorts of things, but the guidelines on the policies of the FBI must be publicly disclosed and not secret in any respect.

I appreciate your patience, and the time I have taken.

Mr. EDWARDS. Thank you, Mr. Perlin.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. I have no questions at this time, Mr. Chairman.

Mr. EDWARDS. Mr. Perlin, you say that you have examined personally 200,000 files, all received through court action or through Freedom of Information Act; is that correct?

Mr. PERLIN. Right. Yes, that's correct.

Mr. EDWARDS. Are any of these files recent files?

Mr. PERLIN. The most recent file that I have, I would say, with a few exceptions, are 1977. I do not believe I have any files for 1978 or this year.

Mr. EDWARDS. Was there criminal activity described in any of these files?

Mr. PERLIN. In most of these files, there was no criminal activity on the part of the subject involved whatsoever, and these were primarily in the area of people engaged in constitutional, lawful, peaceful activity.

Mr. EDWARDS. Mr. Perlin, what is the Fund for Open Information? When was it started; who are the people behind it, where does it get its money; and what does it do?

Mr. PERLIN. A fair question.

The biggest problem is it doesn't get enough money, but I'll put that aside.

The Fund for Open Information and Accountability was organized and incorporated in the State of New York in 1977 as a not-for-profit corporation.

It thereafter received tax-exempt status from the Internal Revenue Service, I believe in the spring of 1978.

It is dedicated to the concept of accountability and informing the people as to how they may implement and protect the Freedom of Information Act, and its prime focus and its activity has been, partly by reason of its having access to the Meeropol-Rosenberg files and certain other cases, as a result of the Freedom of Information Act

and the FBI, and the FBI's compliance or noncompliance with the statute.

Finally, it issues educational material as to the nature of the information found in the files and how to get the files.

The money comes primarily from public, open solicitation, by mailing, and also by grants from private, charitable, or educational institutions who appreciate the work that we are doing.

I may have left something out, but——

Mr. EDWARDS. Thank you.

Now you describe in your testimony that your organization is currently coordinating the lawsuit seeking an injunction to stop further destruction of FBI records.

Mr. PERLIN. Right.

Mr. EDWARDS. Are you alleging in this lawsuit that the Archivist is violating the law?

Mr. PERLIN. That is correct. I do have a copy—copies of the complaint<sup>1</sup> which I would be glad to submit. I brought them with me. It charges that the archives, as well as the FBI, is violating the National Archival and Record Management Statutes.

It indicates that the FBI and the Archivist have acted in concert to frustrate the purposes of the FOIA, as well.

A trial has been held on a preliminary injunction for 5 days. I must say, without giving any excuse or alibi to the FBI, the biggest shock that I obtained in getting the records as to what was done in destroying the files was the total abdication, I must confess, on the part of the National Archives and the National Archives Records Service. They completely put themselves into the hands of the FBI, and did what the FBI told them.

In the history of the Archives, they have only seen two to three dozen files picked by the FBI in December of 1976, and also 76 files picked by the FBI in the summer of 1978. That's the sum total of their knowledge.

I may say one other area where they have authorized destruction, and this is the serious question—the National Archives' records of payments to informers, and all vouchers and records pertaining to expenses incurred by informers.

They have received authorization in the past, and they have continued to destroy many of those files.

Mr. EDWARDS. Well, what kind of a system would you suggest for eventual destruction, if any, of FBI records?

Mr. PERLIN. There we come across some conflicting opinions. The historians and archivists that I have spoken to, as indeed we had one well known historian—you may have heard of him, William Appelman Williams—who testified in the course of the trial, and he said this same policy should be followed for FBI files as is followed by State Department files.

Any action, operation and function, any documents reflecting their investigation, should be preserved.

Now the FBI has microfilmed at headquarters 1,700,005 files. They still wish to destroy those files as well.

<sup>1</sup> The complaint in *American Friends Service Committee v. Webster* is reprinted at the conclusion of Mr. Perlin's testimony.

I think with the technological advances being made, there is no reason why all of the files should not be preserved. If there is to be selectivity, we must use historians and other scholars having knowledge of what is valuable in terms of history and research, and we also must use, I am afraid, lawyers who are not government lawyers to determine what records bear upon the rights of individuals who are being injured, what suppression of information is taking place that might be exculpatory.

There has to be a system of review. If the review gets too heavy, I think the FBI has one other option: Preserve it. If anybody wants his or her file destroyed, the Privacy Act gives the means of effecting that, and there is a remedy.

Mr. EDWARDS. I have one more question in this round, and that is what about information that comes in unsolicited, anonymous letter to the FBI field office in San Francisco that says Joe Smith is a Communist and a crook and a terrible person. What do you think should be done with that?

Mr. PERLIN. I think that probably could be destroyed, and I think we might even have some agreement on that. I think the FBI has indicated in one of its proposals that such information might be destroyed.

The only thing, my concern would be is the definition of unsolicited material. But if it is as described in your question, I would say it could be destroyed.

Mr. EDWARDS. Mr. Hyde?

Mr. HYDE. I have no questions.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. No, thank you.

Mr. EDWARDS. Counsel?

Ms. LEROY. Mr. Perlin, to get back to your theory of the perfect recordkeeping system, you are basically saying that, if you had your preference, no files would be destroyed. How do you square that theory with the notion of people concerned about privacy, including some members of this subcommittee, that the safest way to keep the FBI from getting into trouble is to have them destroy all of those records? The safest way to assure that people's privacy is preserved is to destroy the records as soon as the FBI is done with them, so that damaging information would not be made available to the public, and the FBI would stay out of trouble altogether.

Mr. PERLIN. Well, there is a certain contradiction there. The reason that any privacy rights might be violated as a result of the FBI file disclosure is because the FBI acted illegally and obtained information it shouldn't have obtained, that didn't relate to an appropriate investigation, by and large.

We have the problem then, how do you balance it? How do you guarantee that the FBI will not engage in that conduct in the future?

The people who are victims of intrusion are not having their innermost secrets be disclosed by the FOIA. There is an exemption. Sometimes it's overly used by the FBI, on the question of unwarranted invasion of privacy. That information can be deleted, if somebody requests it. Most people don't know they have a file.

You have 6½ million files at headquarters, an index of 60 million people in headquarters. You have millions more than that in the field offices with their own indices.

Now, to destroy all records so that we deprive people not only of the right to have the redress of their grievances, but to have records which will serve as an example of what a police agency should not do, I just don't think would be wise.

There is sufficient protection. Anybody who wants his file destroyed should be notified he has a file, and he would have the option of asking to have it destroyed or ask to have the contents turned over to him.

Ms. LEROY. The outside review that you suggested in response to Congressman Edwards' question, would you place that at the level where the FBI is initially suggesting to Archives that certain records should either be destroyed or be retained, or would you place the burden on the Archives itself to have such a system?

Mr. PERLIN. I would clearly place the burden on Archives. The FBI has the duty to determine when they no longer need those files, and it's taking up unnecessary space. Then the question of accessioning by Archives as a permanent record could require Archives establishing on a volunteer—there are plenty of people, scholars, historians, who are prepared to do it, to do evaluations to determine whether or not the files meet the criteria set forth in the law, as to whether it has historical, research, administrative, or legal value.

Ms. LEROY. Your criticism of Archives, does it apply just to the FBI, or does it treat the FBI similarly with all other agencies?

Mr. PERLIN. The judge asked the Archives that question in the trial, and the representative of the Archives said, "We treat the FBI as any other agency."

I don't want to make any accusation of the Archives in regard to any other agency, because I don't have the meticulous facts to do so, but I would say the very nature of the history of the FBI and the disclosures that were obtained make it a special agency.

It may have had special powers, it may have had secret operations, that makes it even more important that their files be preserved more than the Homeowners Loan Corporation, possibly, or a similar type of Government agency.

Ms. LEROY. I just have one last question.

In your capacity as counsel of the *Meeropol* case, or any of the other cases that you have been involved in, have you come across records in field offices that were not made available to you in request for headquarters files?

Mr. PERLIN. The best example on that is the *Meeropol* case, where they said there was no need to get any field office files, everything was contained in the headquarters files, and we were given 33,000 pages.

It took 3½ years of litigation to get the FBI, and a series of court orders, to produce the field office file, and the ratio of field office to headquarters is anywhere from 1½ or 1.8 to 1 to seven times greater than the headquarters files. The FBI has acknowledged in that case that all vital, primary investigative records, all original statements, all surveillance, all investigators' notes, are to be found only in the headquarters—rather, only in the field office.

The headquarters merely gets the summary of that which it might consider relevant for prosecution.

Ms. LEROY. I have no further questions.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. I have no questions.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. I have no questions.

Well, I don't know what questions have been asked.

Was the gentleman asked as to just purely investigative matters, when there has been criminal activity and there is an investigation ongoing?

Mr. PERLIN. I'm sorry, maybe I didn't get your question clearly.

Mr. VOLKMER. Let's say there has been criminal activity and there is an investigation of it, and because, let's say, the FBI decides not to pursue it because of local government or the State prosecutes it, and you end up with the State and the FBI has these records. Now are you saying those should never be able to be destroyed?

Mr. PERLIN. That is right. I think they would not be available under the FOIA, as long as a legal proceeding is pending, or that it would in any way affect the fairness of the trial. But once the legal proceeding is terminated in the State court or the appropriate jurisdiction, I don't see any reason why we shouldn't know what is in the FBI files.

A classical example of this, I might say, is in the whole field of civil rights. There in many cases it is, or has been, the State that took some action—sometimes not, sometimes the FBI has to continue the investigation afterward, if there was an inadequate prosecution.

I think if it was within the competence of the FBI to investigate, it should be preserved. If it was beyond the competence of the FBI to investigate, it should also be preserved so that we may get an explanation.

Mr. VOLKMER. In other words, you're insisting that all records of the FBI, whatever they are pertaining to are entitled to historical significance, and therefore should be preserved and not destroyed?

Mr. PERLIN. I'm willing to have any of those records appropriately evaluated to be selected in an intelligent way, but not by the FBI. They are the ones whose records must be scrutinized and evaluated by someone else, and it has to be someone else who doesn't have a vested interest in preserving secrecy.

Now the FBI has sought, by legislative proposal, as well as by speeches around the country, to immunize itself from the FOIA. It wants to keep its files secret, and I say it's mandatory if we want to preserve the democratic process that that never happens.

Mr. VOLKMER. Under no circumstance should any files be destroyed?

Mr. PERLIN. Any file that anyone knows exists about him or her, and he or she has the right to have destroyed under the Privacy Act, that file can be destroyed. We now have means of preserving such files and reducing the space of the area necessary to preserve it, and there is no reason why any harm will be done by its preservation. And the FBI does have a history—what it will do in the future I am not here to comment upon, but it does have a history that goes back a long time of acting unlawfully, acting beyond its jurisdiction, and we will never effectively prevent it.

If you look at the debates of Congress in 1907 and 1908 and 1909, I must say those Congressmen were pretty smart. They were concerned that what has happened would happen, when many of them opposed even the organization of a Bureau of Investigation.

Mr. VOLKMER. One last question, Mr. Chairman.

You are not telling us, though, that basically that the FBI should be done away with?

Mr. PERLIN. No, no, no, no. I think——

Mr. VOLKMER. I mean you're not like those people back then?

Mr. PERLIN. No; I think its jurisdiction should be sharply defined, limited to insure that it will do what it is supposed to do and will not do what it is not supposed to do, and will not act unlawfully and will not usurp the rights of the people.

Mr. VOLKMER. Individuals act unlawfully.

Mr. PERLIN. Yes; that's why we have courts and police.

Mr. VOLKMER. Thank you, Mr. Chairman.

Mr. EDWARDS. Well, Mr. Perlin, your testimony is then that you are against section 533C of the charter because it would authorize too much destruction of FBI files; but in addition, you were saying that the present law says that the Archivist can order destruction if the documents do not have sufficient value for purposes of historical or other research function. Are you saying that is a good law, but it's not being enforced?

Mr. PERLIN. That is a good law, and it is not being enforced. I am not so naive at this stage in my life to ask for perfection, but I think that what was enacted over a series of years to preserve our history is something that's too important and too vital to us.

Mr. EDWARDS. And your testimony is also that certain people over at the Archives Office are protesting the actions?

Mr. PERLIN. That's right. Many of the appraisers are concerned—and I have, and I would be glad to leave, some memos of the Archives, indicating that concern.

Mr. EDWARDS. Did you say that the court has stopped this destruction?

Mr. PERLIN. Well, the court has reserved decision, and that was 2 weeks ago.

Mr. EDWARDS. Is it going on? Are they destroying right now?

Mr. PERLIN. They are destroying only certain files. What has happened is headquarters files, they proposed the plan, the 1977 plan, for destroying 40 to 70 percent of the headquarters files, feeling, I imagine, that it was controversial. They asked approval, which they don't have to get, from the committees of the Congress. That has not been forthcoming. So they are holding up the destruction of investigative headquarters files.

They were destroying field office files and are destroying field office criminal files. Because of the pendency of the prosecution against Miller, Felt, et al. They have temporarily imposed a self-moratorium on the destruction of security files in the field office.

So you have the criminal files being destroyed right now, and in terms of the interim relief that we asked for, it was converting the unilateral moratorium into an injunctive provision.

Mr. EDWARDS. Are there any further questions?

Ms. LeRoy?

Ms. LeRoy. We focused primarily here on section 533c. I wonder if you'd care to comment generally on what other provisions in the charter you think have an impact on the Freedom of Information Act or other public disclosure laws.

Mr. PERLIN. Well, first of all, the informant provision, which I believe is 513, section 513 of the statute, gives absolute immunity,

and that means that no information about informers, even if they act unlawfully, or even if they are investigating beyond the jurisdiction of the agency, would ever be disclosed.

This means that much material can be put in the informer files that we would never be able to see. We have a heavy burden under the FOIA to get informer file as it exists.

I mean I think the classical case is the Socialist Workers Party, where there is acknowledged illegal operation by informers, and they do not wish to disclose that fact. Why, I really don't know.

I may say this in the presence of the FBI: Many of the names that they cross out or hide the identity of the informer, is known to the examiner of the files. It's a fictitious form of secrecy and confidentiality. It just makes it difficult, and it induced them to permit informers to act illegally, and so I would object to that provision, which also denies the power of the court to do anything.

It's true in the Socialist Workers Party, *certiorari* was denied, but a party never could even ask for it under this bill.

Ms. LEROY. I have no further questions. Thank you.

Mr. EDWARDS. Well, in the *Meeropol* case, thousands of documents were denied you, and your clients, but then the judge ordered them released; is that correct?

Mr. PERLIN. That is correct, but I must add one caveat, and Mr. Bresson, who is here, knows we went through a long process. I had him and another FBI agent on the stand for 19 days. They still are withholding 100,000 pages on documents, most of which is more than a quarter of a century old, on the grounds of national security, national defense. And of the files that we obtained, a goodly 60 percent of them have deletions on pages, and we will have to weather that form of the litigation.

And much as I am proud of the FOIA, it's not an inexpensive process and it's time consuming.

Mr. EDWARDS. Well, thank you very much, Mr. Perlin, for your very helpful testimony. We appreciate your coming today.

Mr. PERLIN. Thank you.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN FRIENDS SERVICE COMMITTEE; AMERICAN INDIAN MOVEMENT; ALLIANCE TO END REPRESSION; CENTER FOR NATIONAL SECURITY STUDIES; HISTORIANS FOR FREEDOM OF INFORMATION; INTERRELIGIOUS FOUNDATION FOR COMMUNITY ORGANIZATION, INC.; NATIONAL COMMITTEE AGAINST REPRESSIVE LEGISLATION; THE NATION ASSOCIATES, INC. and NATION ENTERPRISES (THE NATION); PROJECT FOR OPEN GOVERNMENT; WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM; JOHN FOSTER BERLET; ANNE BRADEN; HARRY BRIDGES; JOHN HENDRIK CLARKE; BLANCHE WEISEN COOK; RICHARD CRILEY; ANGELA DAVIS; EMILE DE ANTONIO; FRANK J. DONNER; RICHARD A. FALK; CAROL BERNSTEIN FERRY; W. H. FERRY; HOWARD FULLER; HAROLD FRUCHTBAUM; LARRY GARA; CARLTON GOODLET; VIVIAN HALLINAN; VINCENT HALLINAN; JOHN FRANCIS KELLY; ARTHUR KINOY; ALAN MC SURELY; MARGARET MC SURELY; CAREY MC WILLIAMS; MICHAEL MEEROPOL; ROBERT MEEROPOL; JESSICA MITFORD; VICTOR NAVASKY; ELMER G. PRATT; PAUL ROBESON, JR.; JOHN S. ROSENBERG; JOHN ANTHONY SCOTT; HELEN SOBELL; MORTON SOBELL; DON TORMEY; GEORGE WALD; FRANK WILKINSON and WILLIAM APPLEMAN WILLIAMS, DANIEL ELLSBERG; GROVE PRESS; GRACE PALEY; THERON DALE PROVANCE.

Civil No.

COMPLAINT

Plaintiffs,

- against -

WILLIAM H. WEBSTER, Director, Federal Bureau Of Investigation; GRIFFIN B. BELL, Attorney General of the United States; JAMES W. AWE, Section Chief, Records Management Division, Federal Bureau of Investigation; PAUL E. GOULDING, Acting Administrator, General Services; JAMES B. RHOADS, Archivist of the United States; JAMES E. O'NEILL, Deputy Archivist of the United States; THOMAS W. WADLOW, Director, Records Disposition Division of The National Archives and Records Service; JANE F. SMITH, Director, Civil Archives Division, National Archives & Records Service and HENRY J. WOLFINGER, Appraiser, National Archives & Records Service,

Defendants.

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1. This action arises under the First and Fifth Amendments of the United States Constitution; the Freedom of Information Act (5 USC §552) ("FOIA"), the Privacy Act (5 USC §552(a)) ("PA"); the Archival Administration Act, (44 USC §2101 et seq.); the Federal Records Management Act (44 USC §2901 et seq. and §3101 et seq.); The Disposal of Records Act (44 USC §3301 et seq.) and The Federal Property Management Regulations Affecting Records Disposition (41 CFR 101-11.1 et seq.)

2. The plaintiffs are individuals, associations and organizations and their members who are being deprived of their rights and privileges under the Constitution of the United States and federal statutes and who have suffered and will continue to suffer grievous and irreparable injury caused by the acts and omissions of the defendants who are contrary to the law destroying on a massive scale unique, irreplaceable historical records of great legal, research, scholarly and other value of an evidentiary and informational kind, thus unlawfully depriving the plaintiffs of records, information and rights. The plaintiffs seek a temporary and permanent injunction directing the defendants, their employees, their agents and each of them to cease forthwith any destruction of records of the FBI wherever located, and for a declaratory judgment mandating that they comply with the constitutional and applicable statutory provisions and direct that they promulgate regulations in conformance therewith, and define the rights of the plaintiffs and obligations of the defendants with respect thereto.

JURISDICTION

3. This Court has jurisdiction of this action pursuant to 28 USC §§1331a, 1361, 2201 and 2202 and 5 USC §§702-706.

PLAINTIFFS

4. Each plaintiff organization sues in its own behalf and in behalf of its members, associates and affiliates. Each plaintiff organization has a direct and organizational interest and stake in the preservation of the files of the FBI and access thereto. Each of the plaintiff organizations has a need for the preservation and access to FBI files to continue and accomplish its constitutionally protected activities and objectives. The destruction of the files and records of the FBI will do irreparable injury to each of the plaintiff organizations and its members, associates and affiliates.

a) Plaintiff American Friends Service Committee ("AFSC"), a not-for-profit membership corporation organized under the laws of Pennsylvania, has its principal place of business in Philadelphia, Pennsylvania with branches, affiliates and members throughout the nation. It has engaged in activities in furtherance of civil rights, civil liberties and peace, independently and in association with individuals and organizations. AFSC has requested and will continue to request pursuant to the FOIA access to the files and records of the FBI.

b) Plaintiff Women's International League for Peace and Freedom ("WILPF") is an unincorporated association with principal offices in Philadelphia, Pa. with affiliates and members throughout the United States. Its goals and activities are the advancing of the cause of world peace, the achievement of racial and social justice and equal rights for women.

WILPF has made and will make FOIA requests for FBI files.

c) Plaintiff National Committee Against Repressive Legislation ("NCARL") is an unincorporated association having its principal offices in Los Angeles, California, with branches and affiliates in various cities throughout the country. NCARL has as its main purpose the protection of the people's First Amendment rights and opposition to repressive governmental actions and legislation.

d) Plaintiff Interreligious Foundation for Community Organization, Inc. ("IFCO") is a New York not-for-profit tax-exempt corporation organized under the laws of the State of Delaware in 1968, a part of the Division of Church in Society of the National Council of Churches of Christ. IFCO provides technical, financial and organizational assistance to local and regional community organizations in various parts of the country which seek social, cultural and economic change to promote and advance human rights, and to resist repression. IFCO will make its requests pursuant to FOIA for the field office and headquarters files of the FBI relating to it and the projects it has supported.

e) Plaintiff Alliance to End Repression ("AER") is an unincorporated association made up of a coalition of 15 organizations, religious, professional and community, and numerous individuals, in Chicago, Illinois, engaged in defending constitutional, civil and private rights and freedoms and in resisting repression by state, local and federal government agencies in the area of domestic intelligence, law enforcement and the criminal justice system. AER has obtained FBI files and will make FOIA requests for FBI files.

f) Plaintiff American Indian Movement, Inc. ("AIM"), a corporation having its principal offices in Minneapolis, Minnesota, is dedicated to the advancement of the protection of the sovereignty, welfare and culture of the Native American nations and serves to protect the Native American people from governmental repression and attack by various federal government agencies including the FBI. It seeks to preserve the history of the Native American people so that it may be transmitted to their children. It will seek FBI files pursuant to the FOIA.

5. Plaintiff Center for National Security Studies ("CNSS") is an unincorporated association with its principal offices in Washington, D.C. founded in 1974 to collect and analyze the contents of documents released under the FOIA, particularly from agencies such as the FBI and the CIA and to disseminate information concerning the contents thereof and its impact upon the democratic and political processes of this nation. FOIA requests have been and will be made by CNSS for FBI files.

6. Plaintiff Historians for Freedom of Information ("HFOI") is an unincorporated association of more than 200 historians and scholars from all parts of the country and has its principal offices in New York, New York. HFOI seeks to preserve and strengthen the FOIA to assure the historians and the public's right to know and seeks the preservation of the files of the FBI and other intelligence agencies of the federal government for historical, research and educational purposes.

7. Plaintiff Project for Open Government (the "PROJECT") of the Fund for Constitutional Government, a not-for-profit tax-exempt corporation, has as its purpose the obtaining of files, records and information from agencies such as the FBI and upon the receipt of the same to inform and educate regarding the unlawful abuses and excess of power engaged in by such agencies.

8. Plaintiff The Nation Associates, Inc., a New York corporation and Nation Enterprises, a New York limited partnership is engaged in the publication of a magazine, THE NATION. THE NATION is a magazine of political and social commentary which engages in investigative reporting on the government and has taken as its special responsibility the monitoring of the intelligence community. It regularly publishes articles based wholly or in part on materials obtained under the FOIA.

#### Individual Plaintiffs

9. Plaintiff John Anthony Scott, a resident of New York, is chair of HFOI, a historian, writer, and teacher with his doctorate in history and political science, visiting law professor in legal history at Rutgers University School of Law, and has authored numerous books and articles in the field of American history and political science. Scott has used information obtained from the files of the FBI in his writing and teaching and will have need to request and obtain FBI files for such purposes now and in the future.

10. Plaintiff Harold Fruchtbau is a resident of New York and secretary of HFOI. He is an associate professor of history and philosophy of public health at Columbia University with a doctorate in the history of science. Plaintiff.

Fruchtbaum has previously requested, pursuant to the FOIA, specific files and records of the FBI containing information of major historical importance in the area of his research and writing only to be informed that these vital files and records were destroyed by the FBI with the approval of NARS. Plaintiff Fruchtbaum will be required and will make FOIA requests for FBI files.

11. Plaintiff Frank Wilkinson, a resident of the State of California, is executive director of NCARL with whom he has been associated since 1960. Plaintiff Richard Criley, a resident of the State of California is director of the Northern California Region of NCARL and from 1960-1976 was the director of the Chicago Committee to Defend the Bill of Rights. Both plaintiffs and the organization in whose behalf they work have been targets of FBI unlawful activities which are reflected in the files of the FBI. Additional requests for files will be made by plaintiffs in the furtherance of their work and to obtain evidence which may be used in an action for damages and injunctive relief.

12. Plaintiff Victor Navasky is the editor of THE NATION and both individually and as a writer, and in his capacity as editor requires the preservation and access to the files of the FBI.

13. Plaintiff Paul Robeson, Jr., a resident of New York, son of Paul Robeson and Eslanda Robeson, is a writer and lecturer and engaged in amassing records pertaining to the life, activities and contribution of his parents to the nation and the world. To this end, it is essential that he obtain the FBI files and records relating to his parents, their activities

and associations. Plaintiff Robeson has made and will be required to make additional FOIA requests for FBI files.

14. Plaintiff John S. Rosenberg, a resident of Arlington, Virginia, is an historian and writer presently engaged in writing a book on the life of Clifford J. Durr, an important figure in the New Deal. Plaintiff Rosenberg has made FOIA requests for FBI files only to be informed that the desired files in the Mobile field office (containing information not to be found at headquarters) were destroyed notwithstanding a pending request. Plaintiff intends to make additional requests of other FBI field offices regarding his present and planned work.

15. Plaintiff Emile de Antonio, a resident of the State of New York, is a director and producer of documentary films, a writer and lecturer. Plaintiff deAntonio has filed FOIA requests and thereafter instituted an action pursuant to the FOIA. Files not encompassed by the present pending litigation are and will be needed by plaintiff de Antonio in his present and planned work and requests for the same will be made.

16. Plaintiffs Carol Bernstein Ferry and W. H. Ferry, residents of the State of New York, long-time social and political activists who have been involved in anti-war and human rights activities, have requested FBI files relating to themselves and others and as yet have received only a limited portion of the same. The absence of files yet produced or accounted for and encompassed by future requests requires the preservation of FBI files and the halting of the destruction program.

17. Plaintiff Anne Braden, a resident of the State of Kentucky, was Co-executive Director of the Southern Conference Educational Fund and the Southern Conference for Human Welfare and is Co-chairman of the Southern Organization of Economic and Social Justice and has engaged in activities with the Southern Student Organizing Committee, the Southern Christian Leadership Conference, the Student Non-Violent Coordinating Committee, the Mississippi Freedom Democratic Party, the Congress of Racial Equality and the Highlander Center in Tennessee. Plaintiff is a writer and journalist and will be writing a history of various aspects of the Southern Freedom Movement covering the last 40 years. Braden has and will make FOIA requests for FBI files necessary to conduct the work she is now engaged in.

18. John Hendrik Clarke, a resident of the State of New York, a Professor of History at Hunter College, a historian, teacher and writer, requires access to the FBI files on such subjects as the labor movement and organizations in the South, the Southern Negro Youth Congress, sharecropper unions and radical writers.

19. Plaintiffs Margaret McSurely and Alan McSurely, residents of Washington, D.C., organizers and writers, have made numerous requests to FBI field offices and headquarters for files relating to their long activity in the civil rights movement in the South. Plaintiffs have been informed that certain of the field office files requested were destroyed under the FBI Records Destruction Program. Plaintiffs have need to make additional FOIA requests for FBI files.

20. Plaintiff Theron Dale Provance, a resident of Pennsylvania, is currently National Coordinator of Disarmament

and Conversion for AFSC and National Coordinator of the Mobilization for Survival. Plaintiff Provance made an FOIA request, pursuant to the FOIA, for FBI headquarters files relating to himself, and was told none existed. Plaintiff verily believes that the response reveals the inadequacy of the search made. Plaintiff intends to press his request for field office and headquarters files.

21. Plaintiff Morton Sobell, a co-defendant of Julius and Ethel Rosenberg, and Helen Sobell, his wife, who sought his release from prison for a period of over 19 years, residents of the State of New York, are the subjects of massive files of the FBI and records pertaining to them and those who acted in their behalf. The Sobells have made requests for files that are still pending and have filed administrative appeals. They will be requesting additional files needed for books they plan to write and to obtain information which will permit them to obtain legal redress for injuries suffered as a result of unlawful government actions.

22. Robert and Michael Meeropol, residents of Springfield, Massachusetts, sons of Julius and Ethel Rosenberg, have heretofore requested certain files and records and instituted an FOIA action. Notwithstanding the FBI being enjoined from destroying files, files were destroyed. Plaintiffs Meeropol, who are teachers, writers and lecturers, will be requesting additional files and records from FBI field offices and headquarters not encompassed by the present litigation.

23. Plaintiff William A. Williams, is a resident of the State of Oregon, a professional historian, teaching and writing history since 1950 in various universities in the United

States. Plaintiff has published more than 100 articles and nine books all based on extensive and continuing research in the manuscript records of the United States Government. Plaintiff is president elect of the Organization of American Historians. The files and records of the FBI, particularly those containing the primary evidentiary data are essential to plaintiff Williams and any other historians wishing to write and teach the history of the United States in the 20th Century.

24. Plaintiff Richard A. Falk, a resident of Princeton, New Jersey, is Albert G. Milbank professor of International Law and Practices at Princeton University and has been a member of that faculty since 1961. He is an attorney, an historian, a researcher and scholar having published more than 15 books and 100 articles in scholarly journals. Access to the files of the FBI is essential for plaintiff and any other historian who wishes to write of the processes of government and the development of its policies, international and domestic, and the administration of the judicial system in respect thereto.

25. Plaintiff Blanche Weisen Cook, a resident of New York, is an associate professor of history at the City University of New York teaching courses in American History, Social Change and War, Peace and Imperialism. Plaintiff is an author, editor and co-editor of books, articles and monographs. Plaintiff Cook has and will seek access to the files and records of the FBI in the course of her work. Plaintiff has been advised that desired files have been destroyed.

26. Plaintiff Angela Davis is a resident of Oakland, California, a teacher of philosophy at a university in California, an author, with an M.A., a candidate in philosophy

and engaged in writing her doctoral thesis. Plaintiff Davis is co-chairperson of the National Alliance Against Racist and Political Repression who was jailed, falsely charged, tried and thereafter acquitted of the offense of murder and kidnapping. She is a long-time target of FBI investigations and activities. In her work as a teacher of philosophy, as a writer and as a political activist, she intends to make FOIA requests for FBI files to aid her in her writing, her teaching, her political activities and to seek legal redress for wrongs done by agencies of state and federal government.

27. Plaintiff John Foster Berlet, a resident of Illinois, is a journalist, a writer and a coordinator of the Counterintelligence Document Center of the National Lawyers Guild and has made numerous requests for files under the FOIA to the FBI field offices and headquarters. The requests are still pending and in many instances no response has been forthcoming. The requested files are needed for a book plaintiff intends to write.

28. Plaintiff Frank J. Donner, a resident of Connecticut, is an attorney noted for his work in the field of constitutional and labor law, civil rights and liberties. Plaintiff is the author of books on informers and political surveillance by the FBI and other agencies. He is presently engaged in writing a book which requires he seek and obtain FBI files under the FOIA.

29. Plaintiff Carlton Goodlet is a professor, publisher and writer, a resident of California who seeks access to the files of the FBI for use in his research, teaching and writing on such subjects as A. Phillip Randolph, Reverend Abernathy, Martin Luther King and William E. DuBois.

30. Plaintiff Carey McWilliams, a resident of New York, New York, is an attorney, writer, journalist, and until recently for twenty years the editor of THE NATION. Plaintiff McWilliams has researched and written about the major social issues of the day. In his writing and lecturing plaintiff has and intends to make extensive use of records and information released and available pursuant to FOIA requests of the FBI and will continue to seek such files and the information found therein.

31. Plaintiff John Francis Kelley, a resident of Washington, D.C. is a writer who has researched and written on the subject of United States intelligence agencies and their impact on the country's policies, domestic and foreign. Plaintiff Kelly intends to seek, research and write based in substantial part upon information obtained from FBI files.

32. Plaintiff Arthur Kinoy, a resident of New Jersey, is an attorney, teacher and activist in the field of constitutional and criminal law, civil rights and civil liberties. Plaintiff Kinoy is professor of law at Rutgers University Law School. Plaintiff has and will continue to seek access to FBI files pursuant to FOIA and other legal means in furtherance of his work as a lawyer, teacher and activist, and in behalf of his clients.

33. Plaintiff Grace Paley, a resident of New York, is an author-poet long active in the anti-war, women's, civil rights and anti-nuclear movements. Plaintiff has been the subject of FBI surveillance upon information and belief by illegal means, and she will be making an FOIA request for FBI files relating to her and the organizations she has functioned with and will use

the same in books and articles she intends to write.

34. Plaintiff Larry Gara, a resident of Ohio, a conscientious objector was prosecuted and jailed for his resistance to the Selective Service Act during World War II. Thereafter, plaintiff was engaged in various peace and anti-war activities during the period 1951 to 1971. Plaintiff will be making a request for his FBI files to be used in preparation for a legal action to seek redress for injuries he has wrongfully suffered.

35. Plaintiff Harry Bridges, a resident of California, an internationally-known labor leader, president for four decades of the International Longshoremen's and Warehouse Union, vice president of the Northern California District of the Congress of California Seniors, has been since 1934 a subject of FBI investigations as has his union, its officers and members. The files and records of the FBI concerning plaintiff Bridges and the union, his associates, as well as the records reflecting the relationship and cooperation between the FBI and various employers and their organizations will be the subjects of FOIA requests by the union, its members, by labor historians, as well as plaintiff's associates and friends.

36. Plaintiff Don Tormey, a resident of Massachusetts, was from 1941 to 1975 an organizer and international representative in Massachusetts and New England for the United Electrical, Radio and Machine Workers of America (U.E.). Plaintiff, his union, his co-workers he represented were targets of the FBI subject to infiltration by informers, subject to unlawful surveillance and harassment. Plaintiff Tormey intends to make an FOIA request for FBI files with respect to the above for his information and dissemination to others.

37. Plaintiff George Wald, a resident of Cambridge, Massachusetts, is Professor of Biology Emeritus at Harvard University and Nobel Laureate. The plaintiff has an interest and stake in the preservation of the records of the FBI and as a citizen and scientist will seek access to such files for use in his activities and to disseminate the information contained therein and its significance to the public.

38. Elmer G. Pratt, a resident of California, a former member of the Black Panthers, has been imprisoned in California since 1970 on the testimony of an FBI informer. Plaintiff has requested field office files, none of which have been produced. Many documents requested from FBI headquarters are claimed not to exist or that they cannot be found. Plaintiff's files are essential to him to vacate his unjust conviction and obtain the freedom to which he is entitled.

39. Plaintiff Vivian Hallinan, a resident of California is a business woman, author, Chair of WILPF's project for National Priorities and Chair of its San Francisco chapter. Plaintiff Vincent Hallinan, her husband, is a lawyer of national repute, a presidential candidate of the Progressive Party in 1952. Both plaintiffs have been subjects of FBI surveillance and harassment. Plaintiffs have sought and will seek, under the FOIA, FBI files so they may seek legal redress of their grievances and use the information contained therein for books they plan to write.

40. Jessica Mitford, a/k/a Decca Treuhaft, a resident of California is a well-known writer, author and political activist. Plaintiff has made an FOIA request for FBI files and from the limited number disclosed, she can see that a far greater volume of files are being withheld and not accounted

for. Plaintiff needs the files for her work and for information which may serve as grounds for legal redress in behalf of herself and her husband Robert Treuhart.

41. Howard Fuller, (a/k/a Owusu Sadaukai), a resident of Wisconsin, is Associate Director of the College Program of the Educational Opportunity Program at Marquette University and was actively involved in the civil rights and African liberation movements and engaged in trade union organizing in the South. Plaintiff has made requests for FBI files under the FOIA and intends to make further requests.

#### DEFENDANTS

42. Defendant William H. Webster is the director of the Federal Bureau of Investigation ("FBI"), a division of the Department of Justice. Defendant James W. Awe is the chief of the Division of Records Management of the FBI.

43. Defendant Griffin Bell is Attorney General of the United States.

44. Defendant Paul E. Goulding is the Acting Administrator of General Services Administration ("GSA").

45. Defendant James B. Rhoads is the Archivist of the United States. Defendant James E. O'Neill is Deputy Archivist.

46. Defendant Thomas W. Wadlow is director of the Records Disposition Division of the National Archives and Records Service ("NARS"). Defendant J. Wolfinger is an appraiser of FBI records in the employ of NARS. Defendant Jane F. Smith is director of the Civil Archives Division of NARS.

Defendants are sued in their official capacity.

#### APPLICABLE STATUTORY PROVISIONS

47. GSA is an executive agency whose chief officer, the

administrator, is mandated by statute to enforce the provisions of the Federal Records Management Act, the Disposal of Records Act and to promulgate regulations in conformance therewith, defining the duties and obligations of all the constituent parts of the General Services Administration (40 USC §§486, 751).

48. The Archivist of The United States is appointed by the Administrator (44 USC §2102). The National Archives, the National Archives Records Service is a part of the GSA. (June 30, 1949, C.288, Title I, §104, 63 stat. 379).

49. The Archivist, Administrator and NARS are required to establish procedures, promulgate regulations, supervise and control all federal agency programs for the creation, maintenance, use, security, preservation and other disposition of all federal records; obtain and review from the FBI and other federal agencies schedules, lists and programs for record preservation, destruction and reproduction, and to ensure federal agencies compliance therewith. (44 USC §§2105, 2901, 2904, 3102 and 3302, 41 CFR 101-11.103-2, 101-11.404-2 and .406).

50. The Administrator, the Archivist and NARS are required by statute to establish standards, procedures, guidelines and criteria to:

- a. preserve and maintain accurate and complete documentation of the policies and transactions of the federal government and ensure that such records are properly managed (44 USC §2903(1), (5)); and ensure the retention and preservation of records which constitute "evidence of the organization, functions, policies, decisions, procedures, operations or other activities of

government or because of the informational value of data in them," (44 USC §§2901, 3301);

- b. Ensure the preservation of records of historical, research or other value, evidential, informational and functional in nature and their accession by the National Archives pursuant to schedules and procedures required by statute and regulations to be promulgated with respect thereto. (44 USC §§3303, 2905, 3303a; 41 CFR 101-11.12-5, 101-11.103-2, 101-11.406).

51. The FBI as a federal agency is required by statute and regulation to establish a record management system and program and pursuant thereto establish schedules for the control, use and disposition of its records, and to regulate and periodically certify and specifically list and make available to the Archivist and NARS those records which do not have sufficient "administrative, legal, research or other value" warranting further preservation beyond the period of specified retention by the FBI (44 USC §3303). Such program lists and schedules must be submitted by the FBI to NARS and the Archivist for review, approval, rejection or amendment. The Archivist and NARS must then inspect, appraise, determine and certify whether the records have or will have sufficient historical, administrative, legal, research or other value, evidentiary, informational or functional in nature and whether they may serve to protect the individual rights of a person affected by the FBI's action or investigation. The schedule of destruction or other disposition may not be carried out

without the approval of the Archivist and NARS which may be given only in conformance with the provision of the Archival Administration Act, the Federal Records Management Act, the Disposal of Records Act, the regulations required to be promulgated thereunder and in conformance with the provisions and purposes of the FOIA, and with the approval of the Comptroller General of the United States. (44 USC §§2101-2113, §§2501-2507, §2701, §§2901-2909, §§3101-3107, §§3301-3303-3309, §§3303a, 3314; 41 CFR 101-11.207-3(a)(b) and 44 USC §3309).

52. The Freedom of Information Act enacted in 1966 (5 USC §552) did not permit access to the investigative or other records of the FBI or other investigative agencies. As a result of disclosure in 1973 and 1974 of the illegal activities engaged in by the FBI and other intelligence agencies, the invasions of privacy, the burglaries and "black bag jobs," the violations of fundamental constitutional rights and misuse and excesses of power in office, Congress enacted amendments to the FOIA in 1974 to compel public disclosure and enforce the people's right to know of the activities of their government and its agencies and to compel them to account. For the first time in its history the records and activities of the FBI would be available to other agencies and branches of government and the public as well. The cloak of secrecy was to be removed and the non-accountability of the FBI was to end.

53. The Attorney General was mandated by statute and executive order to ensure that all the federal agencies comply with the FOIA and its purposes and to supervise and obtain compliance therewith. The FBI, as a bureau of the Department of Justice is subject to the control of the Attorney General

in its management of its records and preservation of the same so that the records would be available upon request pursuant to the FOIA. Applications of the Disposition of Records Act were required to be modified accordingly and regulations were required to be promulgated to assure compliance with the FOIA.

54. The defendants have done nothing to assure compliance with the FOIA in its application of the record disposal plans of the FBI other than promulgate a meaningless and vague regulation that in the creation of records and in internal auditing, it "consider" the FOIA and PA (41 CFR 101-11-207.3 (a)(6)), and at the same time authorize and carry out a massive destruction of files.

55. Defendants Goulding, Rhoads, O'Neill, Wadlow, Smith and Wolfinger, unlawfully:

- a. failed to establish standards, procedures, guidelines and definite and effective regulations to implement the statutory requirements for the preservation and retention of records of continuing administrative, legal and research value, including evidence of the organization, function, policies, decisions, procedures and operations and activities of the FBI and the informational data contained therein.
- b. failed to establish standards, procedures, guidelines and criteria and promulgate definite and effective regulations to implement the statutory requirements for the preservation and retention of records of sufficient historical, legal, research

and other value, informational and functional in nature requiring permanent preservation and access by the National Archives;

- c. failed to adequately establish procedures and guidelines for the creation of record management control systems and programs of the FBI and the maintenance, use, security and preservation and the appropriate disposition of records of the FBI;
- d. failed and refused to compel or require the FBI to comply with the statutes and regulations and failed and refused, contrary to law, to report said violations of the FBI to Congress and the President and seek the aid of the Attorney General as required by statute, knowing that the FBI had not established record management control systems and programs and had not adequately provided for the maintenance, use, security, preservation and other appropriate disposition of its records, and had failed to compile, as required by statute and regulation schedules and lists of record retention, preservation and disposition;
- e. failed to seek or obtain access to the records of the FBI and to learn the nature and contents of the same; and notwithstanding the absence of the requisite knowledge

of information "appraised" the files, certified to Congressional Committees and others that the unknown files lacked sufficient historical, legal, scholarly, research or other value and that the contents would not serve to protect the individual rights of persons affected by FBI investigations and activities, thus falsely supporting and representing that the defendants had knowledge of the files, their content or value;

- f. certified and attested that the files of the FBI field offices should be destroyed on the false premise, attested to by the FBI, that all the contents thereof were contained in the permanent FBI headquarters files; and thereafter certified and approved the destruction of the aforesaid permanent FBI headquarters files and by these means secured the destruction of massive quantities of records of great historical, research, legal and other value and essential for the protection and use of persons affected by the activities of the FBI.

56. In the absence of clear, definite, effective regulations, criteria and standards and in the absence of requisite information, any discretion vested in the defendants aforesaid could not be reasonably exercised. To the

extent any discretion could be reasonably exercised, the conduct of the defendants, their omissions and derelictions, their certifications and approvals of the FBI's requests for destruction of files constitute a gross abuse of discretion.

57. Defendants Webster and Awe, their agents, deputies and employees unlawfully:

- a. failed and refused to establish the required record management program and control system for the use, security, preservation and other disposition of records, and failed to establish standards, guidelines and criteria for the completion of specific lists and schedules of retention and preservation of records reflecting the organization, functions, policies, decisions, procedures and transactions of the FBI and records of administrative, legal and research value; and willfully disregarded the applicable statutes above cited and the regulations promulgated thereunder;
- b. knowingly and unlawfully failed and refused to give the Archivist and NARS access to its records and refused to comply with the statutes and regulations, and willfully and unlawfully planned and effected the destruction of files of the greatest historical, research, legal and current social and political value, and which were and are the subject of pending.

FOIA requests;

- c. knowingly withheld and suppressed the fact that the records of the FBI it requested to be destroyed had great historical, legal, research, administrative and other value, that the files reflected facts and information which were vital to the protection or enforcement of individual rights of persons affected by the activities of the FBI, all to induce and cause the Archivist and NARS to authorize the destruction of said files;
- d. falsely represented that all of the records, information, exhibits and contents of the field office files of the FBI were duplicated in the "permanent" headquarters files and that upon such representation sought and obtained the approval of the Archivist and NARS to destroy millions of field office files and thereafter sought and obtained the approval of the Archivist and NARS for the destruction of the very same "permanent" headquarters files;
- e. secretly and surreptitiously destroyed, removed and otherwise disposed of FBI records without the knowledge or approval of the Administrator, the Archivist or NARS.

58. Plaintiff Bell his deputies, agents and employees

- a. failed and refused to ensure that the FBI maintains a lawful, proper records management program, including a plan to preserve and retain all records "containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" and "designed to furnish the information necessary to protect the legal and financial rights of ... persons directly affected by the agency's activities" (44 USC §3101) and to preserve records of historical, research and other value;
- b. failed and refused to supervise the conduct of the FBI's records retention and disposal programs so as to secure full and effective enforcement of the FOIA and to ensure the maintenance and preservation of and access to FBI records as required by statute;
- c. knowingly, unlawfully and improperly authorized, approved and condoned the FBI's field office file destruction proposal in violation of statutes and the First and Fifth Amendment of the Constitution of the United States.

THE FOIA AND THE FBI

59. The FBI in responding to FOIA requests for files

has delayed its responses for periods up to a year and more. The FBI searches have generally been inadequate and incomplete and have on many occasions resulted in responses denying the existence of files which in fact exist. When files are processed the FBI has invoked with an indiscriminate broad brush claims of statutory exemptions from disclosure on grounds of national security, the invasion of privacy and disclosure of the identity of informers and confidential sources.

60. The FOIA administrative appellate process is an additional time-consuming process. Few requesters can afford the expensive and protracted course of litigation to obtain the files which they seek and to which they are entitled.

61. Records have been and are being withheld or have been released with excessive deletions by the FBI under the claim they are classified by executive order, and affect the national security. After the passage of time most, if not all, of these records will become declassified and available under the FOIA. Such documents, if properly classified on national security grounds, are almost by definition documents of great historical, research and social value which should be preserved and retained by the FBI or transferred in appropriate form to the National Archives. The record destruction program initiated by the FBI and approved by the Archivist and NARS is causing the destruction of these important files and deprives forever the plaintiffs and the nation of the opportunity of knowing their contents.

62. Since the enactment of the FOIA, the FBI has sought to impose a moratorium on access to its investigative files for a period of 10 years after the FBI has obtained approval from all of the defendants herein to destroy field office and

headquarters files after retention periods of six months to 10 years. A vast record destruction plan is now in operation and millions of FBI field office files are in the process of being destroyed with plans approved for the destruction of headquarters files as well.

63. Since the enactment of the FOIA, the defendants herein and each of them have failed and refused to take any steps, to devise any system, to promulgate any regulations so as to preserve the files of the FBI so that they are available to those who request them under the FOIA or PA. The defendants and each of them have agreed upon, approved and executed plans which guarantee the denial by destruction, of access to files requested pursuant to the FOIA. The defendants and each of them, as a result of their acts and omissions, all in violation of law, are in effect repealing de facto and frustrating the enforcement of the FOIA as it applies to FBI records; they are at the same time destroying files of great historical, research, legal and other value, files that reflect the history of the FBI and its impact upon the rights, privileges and liberties of the plaintiffs herein and the public at large.

#### THE FBI FIELD OFFICE AND HEADQUARTERS FILES

64. The FBI maintains investigative files and records at headquarters, in its 59 field office, 11 foreign liaison offices,\* and in over 450 resident agencies. Investigative files are denominated "administrative," "criminal," "subversive," and "applicant," and are created and held as

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\*For purposes of this complaint, the term "field office" includes and encompasses the FBI's foreign liaison offices.

follows:

- a. all FBI investigations are undertaken and carried out solely by the field offices. All primary and original investigatory records; material, notes and exhibits and records are collected by and housed solely in the field offices. These include: informer and other "confidential source" records, logs and notes, memoranda, comments, directives and inter-field office communications, comments and memos of case agents and the special agents in charge of the field office. All records and the raw data obtained by investigative techniques and methods used, and indices, records and files reflecting these activities, including logs, transcripts, tapes and photographs, electronic, microphone and physical and other surveillances, all original statements by witnesses, suspects and others are found in the field office files. All administrative records related in any way to the investigative files, and all "back up" material are held in the field office files. Each field office houses its own "Personal and Confidential" files, "Official and Confidential" files, case "Control" files, and files personally held by the special agent in charge.
- b. each of the field offices has its own

records system and indices, many of which vary substantially from those at headquarters. Headquarters does not know or have any records of the number, or the contents of files held in the field offices. The headquarters counterpart file when it exists only contains limited fragmented portions of the field office file.

- c. "preliminary inquiry" files are those created and found only in the field offices. Despite the supposed difference between "preliminary inquiry" files and "regular" investigative files, the "preliminary inquiry" files have a life, scope and content identical to a "regular investigative" file. Upon information and belief, "preliminary inquiry" files number in excess of a million. There are no counterpart files whatsoever in headquarters. The majority of these files are "domestic intelligence-security" files. Preliminary inquiry investigations are under the sole control of the case agent or the special agent in charge. These files contain records and information reflecting unlawful and unauthorized activities by the FBI in domestic intelligence, criminal and non-criminal investigations.
- d. FBI reporting requirements and procedures specifically prohibit a field office from

including in its reports, correspondence and memoranda to headquarters any information or data which would indicate that it was illegally or improperly obtained or that it was obtained in connection with a matter not within the scope of the FBI's conceived jurisdiction, or which might reveal any of its illegal investigative activity. The reports, memoranda and communications from the field offices to headquarters are highly selective distillations and second and third-hand edited reports of what activities were actually undertaken and what information was actually developed by the field offices in the course of an investigation. All information, records and data that were obtained unlawfully or in an unauthorized investigation, or that are violative of the Privacy Act of 1975 exist solely in the files of the field offices.

- e. Field office files, in quantum, quality and scope, are the unique, primary and most complete source of evidentiary, informational, and functional data. These are the files that must fully reflect the investigative and other activities of the FBI and the primary evidence and facts obtained. The scope, contents and substance of field office files far exceed

their counterpart files in headquarters, where such counterpart files even exist. As many federal courts have judicially determined, adequate access to FBI information requires access to the files of the FBI's field offices, as well as to headquarters files, and the production of such files have confirmed such determinations.

- f. When FBI headquarters has a headquarters counterpart of a field office file, the headquarters file is not duplicative of the field office file. So-called duplicative portions of the headquarters counterpart file consist solely of correspondence to and from headquarters, letterhead memoranda, and reports emanating primarily from field offices to headquarters. Even where a copy of the same document appears in both a field office and headquarters file, transactional notes and memoranda indicating action taken, advice and internal memos, whether handwritten or otherwise, made in the field office or headquarters are not duplicated in the other.
- g. Headquarters files contain records, documents, notes, directives, policies and executive decisions and other evidentiary, informational and functional data that reflect relationships with other governmental agencies, private businesses and institutions,

and members of government and private citizens, which are not found in field office files and which are not duplicative of field office files . . The headquarters files are of great historical, legal, research and social and political value.

65. Between 1916 and 1976 FBI headquarters alone opened 6.6 million investigative files, containing upwards of 250 million pages. The FBI states that of these headquarters files, 1,021,000 have been destroyed; 1,700,000 have been microfilmed and 3,900,000 exist in "hard copy." The FBI states its index to the Central Record System consists of 60 million cards of which 20 million refer to a subject or suspect under investigation, and to victims or complainants. Forty million of the index cards contain the names of "associates, witnesses, relatives, neighbors, ad infinitum ...." These are termed "see reference" index cards. Not all persons investigated or evaluated or interviewed are necessarily found in the FBI's Central Record System indices.

#### THE CONTENT, VALUE AND SIGNIFICANCE OF THE FBI FILES

66. The FBI is a bureau of the Department of Justice whose jurisdiction to investigate is statutorily defined and limited. The history and record of FBI activities and investigations, its manner, methods, means and motives, lawful and unlawful and the significance and impact upon the nation and untold millions cannot be known or written except from information which can only be found in its files and records.

67. The FBI over a period of more than 60 years has engaged in investigations and activities far beyond its

statutory authority investigating persons who were engaged in lawful, peaceful activities, and had violated no law but who the FBI believed promoted foreign and dangerous ideas, agitated or created threats to the domestic tranquility and internal security. Under the vague categories of "domestic intelligence" and "security," and the FBI's subjective political judgments it investigated aliens, "subversives," "nationalists," "extremists," "radicals," "communists," and "political and labor agitators." It has investigated millions of people and untold thousands of organizations who were lawfully exercising their democratic and constitutional rights.

68. The FBI, based upon its domestic intelligence-security investigations, compiled many lists of persons numbering in the hundreds of thousands both in headquarters and in field offices, who would be subject to arrest, detention, supervision and surveillance in times of "national emergency" or periods of internal unrest. To this end, the FBI and the Attorney General in the late 1940's entered into a secret agreement entitled the ATTORNEY GENERAL'S PORTFOLIO PLAN which remained in force and effect until 1967 and not only provided for massive arrests, searches and seizures under master warrants, but also provided for the suspension of the writ of habeas corpus, the right to bail and judicial review..

69. The FBI in all its investigative activities has relied primarily upon a widespread network of paid and unpaid informers and indiscriminately invaded the privacy of persons by obtaining information from "confidential sources" such as banks, insurance companies, communications systems, credit agencies, employers associations, religious institutions; educational institutions and other organizations.

covering every sphere of the nations social and economic life.

70. In its investigations in the field of domestic intelligence-security as well as its investigations of violations of federal criminal laws, the FBI relies on and resorts to illegal methods and techniques to acquire information by physical, electronic and other forms of surveillance, illegal entries, mail covers and openings and the theft of records and information.

71. In addition to its "investigative" activities, the FBI engages in covert operations, promoting and provoking crimes, disruption and discord and has caused the injury and death of persons and damage to countless individuals and institutions and embarrassed, discredited, divided and disrupted individuals and organizations engaged in peaceful and lawful activities.

72. The FBI in its records system has established 205 categories of investigative activities and has constructed its files accordingly. The FBI acknowledges that at least 25 of these categories are of a "domestic intelligence-security" nature (Exhibit A). Other categories are used or are easily susceptible to be used as a cloak for domestic intelligence-security activities.

73. The files and records of the FBI, both in headquarters and field offices, are unique and irreplaceable and of the greatest historical, research and legal value. They contain and reflect evidentiary, informational and functional documentation and chronicle the role and impact of a national political-criminal police force of tremendous power and influence. The operations of this agency have had a profound effect upon the legal rights and remedies of the plaintiffs

herein, as well as untold numbers of other individuals and organizations, upon the constitutional rights and liberties of millions of people, as well as the policies and functioning of government in areas far broader than those relating to the investigation of violation of federal criminal laws. These files and records constitute a part of this nation's history which its people and government have a right and need to know. The preservation and access to FBI files for research and analysis and the lessons to be drawn therefrom are essential to assure the integrity of the democratic process.

74. The history to be derived from the files and records of the FBI bear upon the most fundamental questions of relationship between government and people, the role of police and intelligence agencies in a democratically ordered society. The FBI files and records relate and bear upon fundamental questions of federal-state relations; the fair administration of the civil and criminal law, the impact of the FBI upon the lives of the people of the United States.

75. The files and records of the FBI contain substantial information about conduct which has affected and impaired rights of individuals and organizations. The preservation of these files is essential so that they are available to persons seeking to invoke their legal remedies for injuries done them. Only by preserving the files and records of the FBI may plaintiffs herein invoke their rights under the FOIA and exercise their constitutional liberties and prerogatives.

#### THE DESTRUCTION OF THE FILES

76. Prior to the enactment of the amendments to the FOIA making the FBI's investigative files accessible to the

public, there had been FBI requests for the destruction of field office files, on February 5, 1945 and February 7, 1946. The FBI in its two requests for destruction, one covering files for the years 1910 and 1938 and the second for subsequent years, represented and certified that the files did not have "sufficient administrative, legal, research or other value to warrant their further preservation" because the contents thereof were duplicative of those found in "permanent" files at FBI headquarters.

77. At the time of the submissions of their requests, none of the files and records had ever been available for examination or review by the Archivist or NARS, and they had no knowledge of the contents. No standards, procedures or guidelines for FBI record management and preservation and other disposition formulated proposed or tendered to or by the FBI. Notwithstanding the FBI's destruction requests, the Archivist and NARS certified that the unknown secret files had no historical, legal, research or other value. These certifications and the approvals based thereon were false, fictitious and misleading. It was based upon these fraudulent certifications and approvals, that the Congressional Committees were induced to give their approval.

78. The FOIA as amended was effective as of February 20, 1975. On May 22, 1975 the FBI submitted to NARS and the Archivist a request for authorization to destroy all field office files, index cards and related materials immediately upon the closing of a case where there had been no prosecution; where the perpetrators of the crime were not ascertained; or where investigation revealed that the allegations were unsubstantiated or "not within the jurisdiction of the bureau."

These files included the "preliminary inquiry" files and no counterpart existed at headquarters. No portion of the contents of these files were transmitted to headquarters. Headquarters had no knowledge of their nature, contents or existence. The FBI at headquarters, certified that these field office files no longer had "sufficient reference or evidentiary value to merit retention". A major portion of these files pertained to domestic intelligence-security matters.

79. The Archivist and NARS, having no knowledge of the facts of the files, again approved and authorized their destruction and falsely certified that these files had no informational or other value, and that the contents thereof did not serve to protect or enforce the individual rights of persons affected by the activities of the FBI and thus did not warrant permanent retention or preservation and approved their destruction.

80. On March 4, 1976 and June 16, 1977 the FBI submitted additional requests for the destruction of all closed field office files stating that the "originals, duplicates or summarizations" were contained in the "permanent" headquarters files. These requests broadening the previously existing "authority" for field office file destruction, authorized the destruction of certain of the files after a retention period of 10 years and others after five years; and at the same time the FBI directed field offices to destroy certain files after a retention period of six months.

81. As in the past, the Archivist and NARS without access to the files and knowledge of their contents rendered a fictitious appraisal and certification and approved the.

destruction, stating that they "did not have sufficient value for purposes of historical or other research, functional documentation or the protection of individual rights to warrant permanent retention by the federal government." This certification was signed by defendants Wadlow, Smith and Wolfinger. Said destruction was authorized and approved notwithstanding the total absence of standards, procedures or guidelines for the preservation and other disposition of files required by the applicable statutes.

82. All of the prior destructions of field office files (except those for which there were no headquarters counterparts) were premised upon the fact that their "duplicative" counterparts were "permanent" files at headquarters. On May 4, 1977 the FBI, by defendant Awe, submitted a request for the destruction of headquarters files on a massive scale. Thus, with minute exception, the fragments of the millions of field office files that might be found in headquarters counterparts "permanent" files would be destroyed. Once again NARS and the Archivist rendered their false, fictitious and misleading appraisals, certifications and approvals based thereon.

83. The FBI, since the enactment of FOIA and at this very moment, is engaged in destroying on a massive scale and at a rapid pace, field office files containing records and information of the greatest historical, research, legal and other value to the plaintiffs. By this means the FBI is destroying forever files vital to the nation's and the people's right to know, in derogation of their rights under the First and Fifth Amendment and under the FOIA. This destruction program is being wrongfully executed with the approval and authority of the Attorney General, the

Administrator, the Archivist and NARS.

84. On May 28, 1979 plaintiff's counsel wrote to defendants Bell, Webster, Rhoads, Wadlow and the Administrator advising that this action would be instituted in June 1979. The letter set forth the plaintiffs' concern for the preservation of the files, their importance and value and that the destruction program was in violation of law and contrary to the purposes of the FOIA. Plaintiffs asked that the destruction cease pending the determination of the matter by this Court. A copy of this letter is attached hereto (Exhibit C). Defendant O'Neill responded by letter dated June 12, 1979 acknowledging the ongoing destruction of the files and concluded:

"In summary, we do not plan to modify our previous determination that FBI field office investigative files do not have sufficient value to warrant permanent retention by the Federal Government. Accordingly, we will not comply with your request that the implementation of these disposal schedules be halted."

85. Since the enactment of the FOIA, the FBI acting with the aid and consent of the Administrator, the Attorney General, the Archivist and NARS, has devised and developed methods, techniques, and acts to resist, thwart and frustrate the mandate and purposes of the FOIA and the archival statutes heretofore cited. The FBI program for the destruction of field office files was conceived and is being executed with the knowledge and purpose of denying files and records to plaintiffs and all the persons and organizations entitled to receive them, and irrevocably deprives the plaintiffs herein and people similarly situated from having access to records of the greatest value and importance.

86. The plaintiffs herein, both individuals and organizations

have a clear and important stake and interest in the preservation of the FBI files and the access to them. The plaintiffs represent diverse endeavors and interests in the fields of scholarly research, education, art, science, labor, civil rights and civil liberties, religion, and law and in the areas of race, ethnic and social and political rights and relations. The plaintiffs herein have an interest in the preservation of the files so that they may preserve and enjoy their constitutional rights under the First and Fifth Amendments; so they may exercise their rights to organize, petition for the redress of their grievances, seek legal redress for wrongs done; to exercise the democratic rights upon which the very processes of our government depends. The plaintiffs need the documents and records they seek in their interest and for the interest of those who will follow--for history. Plaintiffs' rights, interests and stake in the preservation of the files and the relief sought will also benefit the interests of the untold millions whose lives and future have been affected by the activities of the FBI.

87. The jurisdiction and authority of the FBI and the limitations to be imposed upon its activities is a matter which soon will be before the congressional committee for consideration. The plaintiffs and the public must have access to the files of the FBI, the history of the FBI, so that the electorate may with knowledge make their views felt and exercise influence in the legislative process now and in the future. To effectively do so, the files and records must be preserved, as well as the right to have access to them.

88. Since irreparable injury resulting from the destruction of the files is now taking place, it is imperative that

such destruction cease forthwith. In light of the unlawful actions of the defendants, a temporary injunction should be granted by this Court.

89. In order to ensure the integrity and security of the FBI files, this Court should direct that the FBI immediately prepare and file a complete inventory of every file and record now in the FBI's custody, care or control found in field offices, liaison offices, resident offices and headquarters and a copy of the same delivered to plaintiffs herein.

90. Since the defendants have never complied with any of the statutory provisions for the management, control and preservation of the files and records of the FBI, this Court should retain continuing jurisdiction and direct, subject to the approval of this Court, that regulations be promulgated, standards, criteria, guidelines and procedures, programs and systems be established to ensure that the files and records of the FBI are preserved and kept available now and in the future.

WHEREFORE, plaintiffs demand orders and judgment:

- (a) permanently enjoining the defendants, their deputies, agents and employees and each of them from destroying in whole or in part any FBI files, records, documents, exhibits and papers of any nature and wherever located, including field offices, liaison offices, resident agencies and headquarters in the care, custody or control of the FBI or any of the defendants herein;
- (b) directing that the files and records of the FBI aforesaid be made permanent files and records and retained by the National Archives;
- (c) directing that the defendant FBI prepare and

file and serve upon the plaintiffs herein a complete inventory of each and every file, record, document and exhibit of any kind with this Court and deliver to plaintiffs a copy of the same,  
(d) directing the appointment of a master to ensure the completeness of the inventory and the security and preservation of the files pending their deliver to the National Archives;

and that this Court retain jurisdiction to supervise and direct the establishment of regulations, standards, criteria, guidelines and procedures and the establishment of records management systems, programs and schedules to ensure that the files and records herein be preserved and made available in accordance with the constitution and the statutes pertaining thereto;

(f) directing that defendants pay plaintiffs' costs and reasonable attorneys fees;

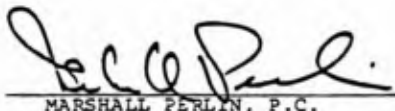
and pending the trial of this action the following relief be granted pendente lite:

(g) that the Court grant the relief sought in paragraphs


(a), (c) and (d) hereinabove.




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Attorneys for Plaintiffs

Dated: June 26, 1979

- 2. Neutrality Matters
- 3. Overthrow or Destruction of the Government
- 14. Sedition
- 39. Falsely Claiming Citizenship
- 61. Treason or Misprison of Treason
- 64. Foreign Miscellaneous
- 65. Espionage
- 97. Registration Act
- 98. Sabotage
- 100. Subversive Matter (individuals); Internal Security
- 102. Voorhis Act
- 105. Internal Security (Nationalistic Tendency - Foreign Intelligence)
- 109. Foreign Political Matters
- 110. Foreign Economic Matters
- 111. Foreign Social Conditions
- 112. Foreign Funds
- 113. Foreign Military and Naval Matters
- 117. Atomic Energy Act-Criminal
- 134. Security Informants
- 157. Extremist Matters; Civil Unrest
- 158. Labor-Management Reporting and Disclosure Act of 1959
- 163. Foreign Police Cooperation
- 170. Extremist Informants
- 185. Protection of Foreign Officials and Official Guests
- 191. False Identity Matters

- 25. Selective Service Act; Selective Training and Service Act
- 39. Falsely Claiming Citizenship
- 40. Passport and Visa Matters
- 42. Deserter; Deserter-Harboring
- 44. Civil Rights; Civil Rights-Election Laws; Civil Rights-Election Laws - Voting Rights Act, 1965
- 51. Jury Panel Investigations
- 52. Theft, Robbery, Embezzlement, Illegal Possession or Destruction of Government Property
- 56. Election Laws
- 62. Miscellaneous - including Administrative, Special Investigative, Cover, Inquiry
- 63. Miscellaneous Civil Suits
- 66. Administrative Informant, Control, Technique
- 69. Contempt of Court
- 70. Crime of Indian Reservation
- 72. Obstruction of Justice; Obstruction of Criminal Investigations
- 73. Application for Pardon and Executive Clemency
- 74. Perjury
- 88. Unlawful Flight to Avoid Prosecution, Custody, or Confinement; Unlawful Flight to Avoid Giving Testimony
- 94. Research Matters
- 116. Energy Research and Development Administration; Nuclear Regulatory Commission - (Applicant-Employee)
- 120. Federal Tort Claims Act
- 121. Loyalty of Government Employees
- 122. Labor Management Relations Act, 1947
- 130. Special Inquiry - Armed Forces Security Act
- 137. Criminal Informants
- 138. Loyalty of Employees of the United Nations and Other Public International Organizations
- 140. Security of Government Employees
- 151. Agency for International Development; Civil Service Commission; National Science Foundation; Peace Corps; U.S. Arms Control and Disarmament Agency; International Labor Organization
- 159. Labor-Management Reporting and Disclosure Act of 1959 (Investigative Matter)
- 161. Special Inquiries for White House, Congressional Committees and Other Government Agencies
- 173. Civil Rights Act of 1964
- 174. Explosive and Incendiary Devices; Bomb Threats
- 176. Antiriot Laws
- 177. Discrimination in Housing
- 180. Desecration of the Flag
- 187. Privacy Act of 1974 - Criminal
- 190. Freedom of Information/Privacy Act
- 195. Hobbs Act - Labor Related
- 197. Civil Actions; Claims Against the Government (FBI)
- 198. Crime on Indian Reservation
- 199-203. Foreign Counterintelligence

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DONNIE BROWER

JMS: GEL-1598

May 28, 1979

Hon. Griffin B. Bell  
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William H. Webster, Director  
 Federal Bureau of Investigation  
 Washington, D.C. 20530

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James B. Rhoads, Archivist  
 General Services Administration  
 National Archives & Records Service  
 Washington, D.C. 20408

Thomas W. Wadlow, Director  
 Records Destruction Division  
 National Archives & Records Service  
 Washington, D.C. 20408

Re: FBI Record Destruction Program

Dear Sirs:

We write this letter as attorneys on behalf of individuals and organizations representing diverse endeavors and interests in the fields of scholarly research, education, art, science, labor, civil rights and civil liberties, religion, politics, and in the areas of race, ethnic and social rights and relations. They and we have learned with dismay and concern of the FBI's Record Destruction Program which is now in process, resulting in the destruction of massive numbers of investigative files and other records in the FBI's field offices.

EXHIBIT "C"

Some of the individuals and organizations in whose behalf we write have requested files under the Freedom of Information Act and have learned that the files have been destroyed either prior or subsequent to their request. Others have learned of the destruction of requested files notwithstanding orders of United States Courts enjoining the FBI from destroying them. All will be requesting field office files now and in the future in furtherance of their endeavors and interests.

We know from facts acquired, experience and research, that the FBI field offices files constitute a unique source of information not otherwise obtainable either from FBI headquarters files or anyplace else. These records are of great historical value to our clients and the general public. They contain evidential informational and functional data which reflect the nature of the information amassed as well as methods, procedures and orientation of the FBI over the period of its existence. The research, social and political value of these records of the FBI field offices are of the greatest importance, requiring preservation. The destruction of these files and records would constitute the destruction of a vital portion of history which the people are entitled to have.

From knowledge and experience obtained in the course of FOIA requests and litigation and from researching of files obtained, it is a clear and unequivocal fact that the quantity, quality and nature of the files in the FBI's field offices are of even greater scope and significance than the files in FBI headquarters which have their own unique contents as well. Not only do the files in the field offices have a greater quantum of documents and facts than headquarters but it is these files alone that contain the primary evidentiary source material, exhibits and other data not found elsewhere, as well as the manner and authority for acquisition. There are thousands of files in the FBI field offices which have no counterparts at headquarters.

A review of the present FBI field office Record Destruction Program and the files and records of NARS bearing thereon as well as the proposed program of destruction of headquarters records, compels us to conclude they are violative of the Archival Administration Act, the Federal Records Management Act, the Disposal of Records Act, the Freedom of Information Act and the Privacy Act as well as the Constitutional

rights of our clients. We have read the NARS report issued in December of 1978. It is clear that the conclusions set forth are totally in error obviously based upon inaccurate and incomplete facts derived from a most limited and inadequate review of the FBI files and destruction program.

It is evident that already all too many unique records of great historical, research and legal value have already been destroyed over the past few years and that process is continuing day by day. To permit the continuance of such destructive practices is unconscionable.

In behalf of the persons and organizations referred to above, we have been authorized and directed to commence an action in the United States District Court for the District of Columbia to enjoin the FBI's Record Destruction Program. We anticipate filing this action sometime in the latter part of June, 1979. To avoid any further irreparable damage pending the filing of the action and the resolution of the issue by the United States District Court, we request, in the national interest, that you immediately cease and desist and hold in abeyance the entire FBI Record Destruction Program. Such action on your part can cause no injury or prejudice to the FBI, the National Archives, the General Services Administration or the Department of Justice. On the other hand the destruction of a unique record is final and irreversible. It would be tragic were you to continue with this program only to have it later determined that the destruction was unlawful and contrary to the national interest.

It is a fact that the FBI's Record Destruction Program constitutes an all too effective means of frustrating, eviscerating and in effect de facto repealing the FOIA.

We ask that you immediately communicate with each and every one of the 59 field offices of the FBI and its eleven foreign liaison offices and direct them to immediately cease and desist from any further destruction of any FBI records in their custody, care or control pending further determination of the matter by the United States Courts.

In view of the emergent nature of the situation I would appreciate your advising me forthwith of your intentions with respect to our request set forth herein.

Sincerely,

Marshall Perlin  
Bonnie Brower  
Samuel Gruber  
David Scribner

Mr. EDWARDS. Our last witnesses today are representatives from the Department of Justice and the FBI, who are knowledgeable not only about the charter, but the Freedom of Information Act and the Bureau's record destruction policies as well, and these witnesses should be able to answer many of our questions in this area.

Our witnesses are Mr. Paul Michel, Associate Deputy Attorney General, and our old friend John Hotis, Special Assistant to the Director of the FBI.

Gentlemen, we welcome you.

Does either of you have a statement?

Would you introduce your colleagues, Mr. Hotis?

Mr. HOTIS. Mr. Chairman, I have with me today Paul Andrews, on my far left, who is the section chief of the records systems section of the Records Management Division, and Tom Bresson, chief of the disclosure section of the Freedom of Information Act Branch of the Records Management Division.

**TESTIMONY OF PAUL R. MICHEL, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND JOHN B. HOTIS, SPECIAL ASSISTANT TO THE DIRECTOR, FBI, ACCOMPANIED BY PAUL L. ANDREWS AND THOMAS H. BRESSON**

Mr. HOTIS. I don't have any prepared statement, Mr. Chairman, but there are a few observations that I would like to make on Mr. Perlin's statement. I have not had an opportunity to review the statement, but I must say I think it deals more with the present litigation than it does with the charter, and the statement that the charter would repeal the Freedom of Information Act is just simply not accurate.

As you know, Mr. Chairman, there is only one section of 537(b) in the charter that deals with the Freedom of Information Act, and it would not in any way alter any of the existing rules with regard to investigatory files.

What we have attempted to do in 537(b) is simply to retain the confidentiality guidelines and procedures, the disclosure of which would assist the criminal in evading investigation, or impair the law enforcement process. So it seems to me to be highly inaccurate to say that we are in any way attempting to change or repeal the Freedom of Information Act.

In addition, I must say that I am surprised to hear so much emphasis placed on this interest of documents as against the privacy which, as you know, from many hearings that we've had before the subcommittee, Mr. Chairman, that has been a major concern expressed over the years about FBI investigations, that they are retained indefinitely. Their disclosure at a later point in time can seriously jeopardize the privacy interest of an individual.

It is with that in mind and particularly with regard to domestic terrorist investigations that we decided on a definite term for retention of those records, and it was the idea, of course, being that if they are retained indefinitely as time passes and they are disclosed, they can seriously jeopardize people who are not in a position to offset any adverse publicity.

We must remember, too, that many of these investigations are based on allegations that turn out to be perhaps unsubstantiated, and they also, in domestic terrorism, will cover activities that have required certain first amendment interests, and so it is for all these reasons that we thought that the destruction of these files over a certain period of time would enhance the privacy interest of the subjects of these investigations. So it's an area that I believe it's a bit more complex than perhaps Mr. Perlin outlined. And in this case, not only the historical interests, but also the privacy interest are of paramount concern, it seems to me, and also the observation that 50 percent of the files have nothing to do with criminal investigation.

He is referring to subversive activities. Whatever the accuracy of that statement in the past, it certainly would not be true under this charter. Under section 533, you cannot conduct an investigation that is anything other than a criminal investigation that deals with actual or potential violation.

Mr. EDWARDS. Are there observations by any of the other witnesses?

Mr. MICHEL. Mr. Chairman, I would like to add in context of Mr. Hotis' observation. He spoke on the Freedom of Information Act, a brief reference to the theory that was followed in the draft of the charter in general. It certainly was followed with regard to the section 533(c) on destruction and retention and dissemination of investigative information in files.

The theory was that the FBI Charter would form part of a structure of statutes enacted by the Congress, of course, equal to the criminal statutes enacted by Congress and would be a key part of the definition of jurisdiction of the FBI, and so, too, other statutes.

Therefore, it specifically intended the charter to preserve essentially the status quo with regard to the Freedom of Information Act, the Privacy Act, various archival statutes and, in fact, in order that there not be any doubt about whether the charter sought to overrule some of those statutes, there were two devices that were followed. Where a statute was sought to be substantially amended or altogether overruled by the charter, there were specific provisions, as you know, toward the end of the proposal, we submitted, that cite those acts and make clear the effect.

And the second device we used was to make reference to some of these major existing statutes, in order to make it absolutely clear that no change was being made in those other statutes.

So, for example, in section 533(c), specific reference is made back to the Privacy Act and to the archival statutes to make it absolutely clear that section 533 was not intended to and does not have the effect of amending or changing or overruling those acts.

And, accordingly, I was much surprised to hear Mr. Perlin, if I understood him correctly and read his statement correctly, to be asserting that the charter did undermine the Freedom of Information Act and the archival statutes.

That certainly is not the plain reading of the text of the charter itself.

Mr. EDWARDS. Well, if that is true, then there must be some problem that you find with the Freedom of Information and Privacy Acts—otherwise, why would you put a new provision in the charter if it is operating appropriately?

Mr. MICHEL. Mr. Chairman, let me first, if I can, add a point as to the operation of the archival statute, because again there is gross misunderstanding, I think.

I believe Mr. Perlin asserted that under the charter, the FBI solely and secretly would decide what records would be retained as historical or similar value under the archival statute. Precisely the opposite is what we intended, and what the law requires, and what the charter preserves as status quo. Under the charter, as before, the evaluation of FBI files from the standpoint of historical value, or value provided as in the archival acts, would continue to be made, in the final analysis, by the Archivist and not by the FBI.

So, both in terms of whether those statutes would be abrogated and in terms of whether the execution of the mandate of those statutes would be conducted as before, the FBI charter, totally contrary to Mr. Perlin's testimony, makes no change whatever. And with regard to the reference, Mr. Chairman to the statutes, there is one very narrow area where we thought it was important to clarify what we think is already the effect of the Freedom of Information Act, and that had to do with public dissemination of Attorney General guidelines.

The reason some clarification was needed is briefly as follows: First, as you know, the Attorney General guidelines promulgated by Attorney General Levy concerning domestic law enforcement and intelligence for terrorism investigations, are all public. They are all public in their entirety. They were shared with Congress before they were promulgated. They were extensively debated in the public forum, before, during, and since their promulgation. Our intent and our expectation is that as a general rule, the pattern will continue under the charter and the additional guidelines which the charter requires the Attorney General to promulgate in some eight areas.

However, there was one area particularly that gave concern and it had to do with undercover operations. We foresaw there primarily—and maybe perhaps it would be solely the danger that in order to be good enough, strong enough, and specific enough, the Attorney General guidelines would have to delve into matters which, if made public, would assist organized crime figures or others who were properly the subject of legitimate criminal investigation, to successfully evade and avoid detection and investigation and prosecution.

In order to provide for that narrow circumstance, we added a provision clarifying, as I say, what we thought was already the shield inherent in the terms of the Freedom of Information Act. Upon certification, disclosure of a part of a guideline such as undercover operations, which would enable criminals to evade those operations, that that part of the guideline—or in the unlikely circumstance a total guideline—in that event only, would be kept from public disclosure. Our expectation is that virtually all the other guidelines would be publicly disclosed, so we don't feel even in that instance, in answer to your question, that we are changing the law.

But we wanted to err on the side of being very clear as to the intent, and that's why we refer to the Freedom of Information Act there, just as we refer to the Privacy Act and the archival statutes within the terms of section 533(c).

We didn't want there to be any kind of doubt or question, which apparently has led to Mr. Perlin speculating about all these major changes and dire consequences. We didn't want anyone to be concerned about that. That's clearly not what the effect is, and it is certainly not the intent.

Mr. BRESSON. Mr. Chairman, if I may just add to that, one of the reasons for 537b pointing out the need for protection is that the FOIA may not provide as adequate protection for guidelines.

There seems to be a dispute in the courts, no uniformity as to whether or not a (b)(2) exemption is sufficient to protect guidelines that would result—the release of which would interfere with our enforcement capabilities, legitimate (b)(7)(e) exemptions that we would be able to claim in an investigatory record, but that we might not be able to claim in a guideline, since a guideline might not be interpreted to be an investigatory record.

Mr. EDWARDS. Thank you. I believe we will have to recess for about 10 minutes.

[Recess.]

Mr. EDWARDS. Before we start, let me apologize for taking so long, but there were a number of votes, and also it will give you a lot of confidence to know that the vote of a Member who is now in Cambodia was recorded on the computer.

[Laughter.]

Mr. SENSENBRENNER. There are ghosts in that building across the street.

Mr. EDWARDS. The subcommittee will come to order.

Counsel?

Ms. LEROY. I'd like to ask a few questions about section 537b dealing with protection of the investigative process.

What is the status currently of availability of guidelines in terms of Freedom of Information Act suits?

Mr. BRESSON. I would say at the present time the request is made for guidelines, we would have to examine them first, and first determine whether or not these guidelines are subsequently harmful to the agency to release them.

One exemption that we would be able to apply is the (b)(2) exemption, which does protect certain internal procedures of an agency. So in evaluating either manuals or guidelines, our present posture is to look for the harm test, and those we can articulate on harm we will seek exemptions to the Freedom of Information Act.

Ms. LEROY. Have there been requests for the guidelines?

Mr. BRESSON. Are you speaking of the guidelines from the Attorney General regarding the charter? No.

Ms. LEROY. No; I mean existing guidelines which are not public, for example, the foreign counterintelligence guidelines.

Mr. HORTS. Yes; there have been. We are in litigation on that point, as a matter of fact. We do not have guidelines on our undercover and informer operations, primarily because the Department of Justice was concerned that they will not be able to retain the confidentiality of those guidelines in the face of the Freedom of Information Act; that some court somewhere might release it, and if you did that you would make public, so to speak, our game plan with regard to covert operations. We do not have any guidelines or the detailed regulations on undercover operations in place at this time.

Ms. LEROY. You have informant guidelines, do you not?

Mr. HOTIS. Oh, yes; and they have been made public.

Ms. LEROY. Could you be a little more specific about the status of the litigation for FBI guidelines?

Mr. HOTIS. I'd have to check the records.

Ms. LEROY. What about requests for the manual of instructions and the manual of operating procedures?

Mr. BRESSON. That was really the nature of our response.

Ms. LEROY. Have there been requests made for those?

Mr. BRESSON. There have been requests made for the manual, and much of it has been released following the determination by us as to the harm involved in releasing portions. Those portions that we felt did cause harm to our ability, for example, to protect our investigative techniques, we did claim an exemption, (b)(2), which is the internal procedures exemption.

Now the question I mentioned just before the break was that the law is somewhat unsettled as to whether or not the (b)(2) exemption is appropriate, to withhold the harmful investigatory material. And for that reason, we were seeking in 537(b) to strengthen our ability to protect that which would really harm the Bureau's operations with regard to investigative techniques and procedures, by declaring that they would be considered investigatory records, and in so doing, we would now have exemption (b)(7)(e) available to us, which specifically addresses the investigative techniques and procedures and allows for us to claim them as exempt under that provision.

Ms. LEROY. When you say the law is unsettled, does that mean that those cases are still going on, and that there has been no final decision as to whether you do or don't have to release that information?

Mr. BRESSON. In our particular case, the court upheld our position on (b)(2). I am aware of other agency cases—I can think of specifically ATF, the Internal Revenue Service, I believe, and the U.S. Attorney's manuals have all come up for judicial review, and the courts have held differently in different jurisdictions. As I understand it, there is confusion in the court of appeals here in Washington as to whether or not the (b)(2) exemption should be upheld in this context.

Ms. LEROY. So, with respect to the Bureau, the court decided in your favor?

Mr. BRESSON. With regard to our manuals, yes; they did.

Mr. HOTIS. The problem, too, is that even where the courts are consistent in their rulings, they rely on different parts of the act; one court even withheld it based on its own judicial discretion.

We don't believe that this really changes the existing case law, but because of the inconsistency in interpretation, we feel it best to make it sort of clear in the charter that this kind of regulation is exempt.

Ms. LEROY. So what you're saying is that this section of the charter basically clarifies what you believe to be the appropriate interpretation of (b)(2) exemptions under the Freedom of Information Act?

Mr. BRESSON. Perhaps stated another way, I think what we believe is that where we can show this harm, where we can articulate a harm in releasing guidelines, because they will interfere with our enforcement proceedings, our investigative techniques, we want to insure that there is available to us an exemption to protect them.

I believe our theory is the determination as to whether it ought to be released ought not to be so narrowly construed as to whether it turns

up an investigatory record or whether it turns up in some noninvestigatory record such as guidelines. Our manual might be construed as what we're trying to do here is have a consistent application wherever harmful law investigative techniques are involved, keeping in mind of course, that the party to whom we deny the information will still have the right of appeal and will still have judicial review of our determination.

Ms. LEROY. Are you saying that these two subsections—(a) and (b) under 537b will be treated the same as the other exemptions under FOIA. In other words, will you have to demonstrate harm, and will the exemption be discretionary, rather than mandatory?

Mr. BRESSON. I think—would you like to address that?

Mr. HORIS. With regard to (b), it's not demonstration, it's determination. As public knowledge would assist the criminal in avoiding detection.

Ms. LEROY. Right now the court makes that decision, doesn't it?

Mr. HORIS. Yes.

Ms. LEROY. So you're taking some discretion away from the court here?

Mr. BRESSON. Again I think it falls back to the question of being able to protect what the Freedom of Information Act, what Congress recognized in passing the Freedom of Information Act and certain investigative procedures should be protected under (b)(7)(e).

The problem is when you get into a noninvestigatory record, you're an agency like the FBI, you are going to be running into the same harm in noninvestigatory records, which you do not have the (7)(e) exemption of the FOIA available to you, since that provision applies only to investigatory records, and where section (a) seems to provide that it should be clear that these are investigatory records and treated under 552(b), in that situation you would still be in a position of having to articulate the harm, being able to show that they are records and disclosure of which would involve—which would disclose an investigative technique.

Ms. LEROY. Are you articulating that harm to the court or only to the Attorney General?

Mr. BRESSON. In (a), I believe we would be articulating there, or could be, to the court, because what we are saying here in (a) is that it shall be considered an investigatory record for the purposes of section 552(b) of title 596 code.

Now with regard to (b), however, I believe that is more in the nature of a (b)(3) statute.

What we are saying in (b) is that if the Director determines that public knowledge of such procedures or any portion thereof would assist the criminal to avoid a detection or would compromise investigative techniques, we can assert the (b)(3) exemption.

However, that determination is subject to appeal and is subject to judicial review.

Mr. HORIS. It would be a different standard of review, though, because it would be a review of the Director's determination, and it would seem to me that it would be more difficult for the court to overturn that unless it's obvious on the face of it that it was—

Ms. LEROY. I'd like to go back to a question that Congressman Edwards was asking earlier about 533c. I'm not sure that I understood

your response to his question, which was that if it is not your intention to affect or change the record management laws, then what is it that you are doing through the section? And if it isn't intended to change current law, why is it there?

Mr. ANDREWS. Well, Mr. Chairman, first of all, it's not the intent that this charter change those rules. We feel that the charter disposal of records is still chapter or title 44 of the United States Code and the Code of Federal Regulations. We simply put a time limit on the file and given the option to retain those files if they are necessary to be retained for investigative purposes or research, and therefore it was included to bring out the point that we wanted to retain them a certain period of time. And it has no conflict with the retention schedule that we presently have.

We presently have approval, awaiting approval by the Justice or by the Judicial Committee on the Hill.

Mr. EDWARDS. Under your proposal, would you still have to get the approval of—

Mr. ANDREWS. Absolutely, sir. We would still have to go through the 115 formats, NSF format.

Mr. EDWARDS. Well, what triggered this change? What about the present law bothers you? What about the present law is getting in the way of FBI operations that would lead you to make this legislative suggestion? What kind of troubles do you have on a day-to-day basis that makes you want to do this?

Mr. HORIS. It was really the idea that it establishes a statutory presumption that records ought to be destroyed, and is based on the recognition that there are important privacy interests involved, particularly where, in domestic terrorists investigations, those investigations are based on activities that are launched by people politically motivated.

Mr. EDWARDS. Well, then why wouldn't the Department of Justice or the Archives suggest to the Government Operations Committee a change in the basic law? Because there are other police organizations in the Federal establishment such as the Secret Service and the Postal Inspectors and others, who have undercover operations, the Drug Enforcement Administration, have many of the problems that your same bureau has.

Why wouldn't the same rules apply to those organizations as well as to just the FBI?

Mr. HORIS. Mr. Chairman, we are the only investigative agency that investigates domestic terrorism. As such, it is an area where there are unique first amendment concerns. That was largely what motivated the destruction provision in this charter.

Ms. LEROY. Subsection (c) of that section was written in the alternative. The FBI shall destroy its records or deposit them in the Archives. Does that mean that the FBI decides in the first instance to destroy a set of files, and then goes to the Archives with what is left over to work out a retention program?

Mr. HORIS. No; I believe Mr. Andrews answered that, saying that we would still file our appropriate forms with the Archives.

Ms. LEROY. It's been suggested that there should be an outside panel of historians, journalists, and other people who may have an interest in the continued retention of not only your old files, but other

Government agency files, to determine or to assist in the determination that certain files should be sent to the Archives.

Would you care to comment on that proposal?

Mr. HORTIS. I don't think I can comment on it. It seems to assume that present archivists are incapable of carrying out the responsibilities.

Ms. LEROY. That suggestion has been made.

Mr. HORTIS. I don't know the case has been made, and it seems to me the Archivists ought to better address that than the FBI.

Ms. LEROY. Well, what if a panel were set up to review records for the FBI before those records went to Archives? It's been suggested that that sort of outside review ought to occur at the Archives level, but it might just as easily occur at the FBI level.

Mr. HORTIS. It would be very hard to set up a panel that would not in some way undermine the public's perception of the retention of confidentiality.

Ms. LEROY. Has Archives actually looked at the FBI files that have been transmitted to it, other than in those few instances that Mr. Perlin mentioned? Or was that the only time?

Mr. ANDREWS. That is correct. He mentioned the 1976 files that occurred in 1978.

Ms. LEROY. Can you give me the background of why that particular review was made?

Mr. ANDREWS. Well, it came about as the result of a public media making accusations that the FBI was in the process of destroying valuable files, and it wound up as a conversation of my predecessor, who is now retired, and his officials. They felt that they should look at files to be assured that they could cover certain points, to make sure that our retention schedules, which we have asked for, were in fact used in good judgment.

Now they did this survey and I believe it was concluded toward the the first part of this year, and it was their assumption, after reviewing those, that basically the historical content of the files of the FBI are contained in the headquarters files.

What is history to one person may not necessarily be history to everyone. I can foresee historians figuring that history is every piece of information they've never written a book about, and in keeping our records system, it is necessary for us to use good management and apply the rules of destruction in order to comply with the requirements and the legislation that is already on the books.

Mr. HORTIS. Well, I am concerned, too, about whether or not this particular provision—it seems to me that what you are asking is are the Archives using proper judgment in making these determinations.

Again I don't think it is appropriate for us to comment on it. It seems to me that's a question for Archives. All we're saying is that we are not going to change those responsibilities to the extent that they remain with Archives.

Ms. LEROY. Well, this section does go to the issue of retention and dissemination of records, which is a function not only of the FBI, but of the Archives as well, and to the extent that the current law is not perfect, the subcommittee has the opportunity here to change it. You suggested some changes; there may be others which should be explored as well.

Mr. HOTIS. Well, I'm not suggesting for a minute that it's not a proper subject for the subcommittee. I'm just saying it's not a proper subject for us to comment on, because I don't think we're in a position to do it.

Ms. LEROY. Let me ask this question, then: The random sample that the Archives performed in 1976 that Mr. Andrews was just talking about, would you go back to that kind of procedure with respect to all FBI files to be sent to Archives or destroyed? Would you consider including that kind of procedure in your records management program?

Mr. HOTIS. Have Archives review it all before it's destroyed? Is that what you are suggesting?

Ms. LEROY. I'm suggesting that—not every file, this was a random sample.

Mr. HOTIS. We'd be willing to consider that, a proposal of that kind, but I think we'd have to think about it and see what sort of administrative burden it would require.

Ms. LEROY. I have no further questions.

Mr. EDWARDS. What if the FBI or an agent might commit a crime while gathering information, and assuming that the charter has been enacted, should records containing this information be withheld under the Freedom of Information or Privacy Act?

Mr. BRESSON. Mr. Chairman, I would say that it should not, and our present policy is, in the processing of records under FOIA, is that we do not conceal any unlawful activity with FOIA exemption. That is a policy that initiated with, I believe it was a written policy from Deputy Attorney General back in 1977. It was one that we had been hearing, too. As I say, it's been memorialized in our instructions, and that is definitely our policy. We do not utilize the exemptions to conceal unlawful activities.

Mr. EDWARDS. According to the testimony of Mr. Perlin, the destruction of files under the present law was proceeding until the lawsuit was filed, and perhaps it's been held up since the lawsuit was filed. Is that correct? The destruction, is it going on right now, pending the outcome of the lawsuit?

Mr. ANDREWS. Mr. Chairman, the only destruction that's taking place in the field at the present—is taking place with Bureau records, is in the field. Now the moratoriums have already been laid down in both headquarters and field files.

We are not destroying any criminal records at headquarters.

Mr. EDWARDS. What kind of records would be destroyed then in the field? What would be the nature of them?

Mr. ANDREWS. In the field? Well, we addressed this from the fact that they could destroy under a 5-year rule and any auxiliary offices, which I believe the chairman is acquainted with, the auxiliary office being the reporting of lead offices to the office of origin, which is the office that has the prosecution.

We are destroying the 6-month—in 6 months those transitory documents which show lead coverage or response to the office of origin's request for assistance, because they become a matter of record in the office of origin.

Now a case in the field that's over 5 years old could be—in three instances which are not reported to bureau headquarters, and that's

basically one in which a file would be over 5 years old, and there is no FBI jurisdiction involved in it; a file that might be in the field that the U.S. Attorney decline prosecution on; and the other one being a file in which the perpetrator of the crime was not identified, or the unsolved crime. These are not reported to headquarters, and if they met the 5-year destruction, they would then be destroyed.

Mr. EDWARDS. Are there any domestic intelligence files being destroyed?

Mr. ANDREWS. No, sir.

Mr. EDWARDS. I think I'd like it explained once more, if you don't mind, specifically why you think the present law is not working, and why you need this change.

Mr. MICHEL. Mr. Chairman, let me offer a point or two on that subject.

I think that the destruction of FBI investigative files involves conflicting or countervailing public interest, as Mr. Hotis pointed out earlier. There are strong arguments to be made, and they are frequently made to us, and the general public and media, that unnecessary retention of detailed information about people's lives and activities, just by its existence indicates interest in the personal privacy for those individuals, and larger social interest.

On the other hand, as many have pointed out, certain files have overriding historical or other importance, so you have conflicting interests. It seemed to us in drafting the charter that weighing the relative force of these conflicting interests, of individuals, of the public, of our whole society, was precisely the kind of thing that is most appropriately done by the Congress, and not by the Attorney General, the Director of the FBI, or anyone in the executive branch itself, and not really as a general matter of policy for the courts either. So in the section on destruction of information and records, we did not attempt to change the mechanics, if you will, set up by existing legislation, but presumed and said that those standards in those laws should continue to be followed.

What we sought was congressional answers to two questions: What sort of file ought to be destroyed? And what is the magic interval? Should it be 5 years? Should it be 10? Should it be 15?

From our study of the problem, we concluded that with regard to answering the first question, that there ought to be, as Mr. Hotis pointed out, a general presumption that after a suitable period, records would be destroyed, with certain exceptions—and on page 27 of the bill before this House, those exceptions are listed, 1 through 4—and I think that they are fairly clear in terms of what we intended.

With regard to answering the second question, what is the appropriate period, from our study we concluded that 10 years was an appropriate period. But the overriding interest of the Department of Justice and the FBI is not necessarily to have you adopt precisely what we thought the right weighing involved; but to make the call, to make the judgment based on a record that you are developing in these hearings, so that we have a congressional determination, so that we are doing what Congress and the people want, so there is no longer such acrimonious debate in court and in the media and in hearings and elsewhere that we are destroying files we shouldn't be, or that we are not destroying files when we should be.

If the Congress will simply make a clean-cut judgment of those fundamental questions, we will be very happy to be sure that those judgments are faithfully honored.

Mr. EDWARDS. Well, suppose 11 years later, a Jean Seberg turns up, and there has been great damage done to an individual, and there are no records.

Mr. MICHEL. Mr. Chairman, in the sense we are starting it, if this charter is passed in the middle of a very fortunate era in the sense that an exhaustive amount of inquiry into questionable activities of years past has been undertaken by the Congress and extensively developed and undertaken within the FBI and elsewhere in the executive branch, it has been such an exhaustive review of the past circumstances that I think that things that should have been reviewed by Congress or made public, have been.

So in a sense we may start from somewhat of a clean slate, and I would think that if the charter were passed—for example, today—that there is substantial protection to any innocent party in the future from the fact that the record could not be destroyed for 10 years. While it may be possible to imagine some circumstances in which 10 more years would pass where there wasn't anything that would prompt the individual involved to file a request under the Freedom of Information Act, it seems to me that the likelihood of that is exceedingly small, and that on the contrary, there is every reason to expect that those requests under the act would be filed.

And as you see from our exception to the general presumption of destruction, if there is a pending request or if there is pending court litigation, or if there is any kind of internal or criminal investigation or other things of that sort, then the normal presumption of destruction at the end of 10 years is put aside.

Mr. EDWARDS. Counsel?

Ms. LEROY. Mr. Andrews, what files that are in field offices are not sent to headquarters, what records?

Mr. ANDREWS. The three that I mentioned, relative to an unknown subject—I mean a file in which the perpetrator of a crime could not be identified, and in those cases wherein prosecution was declined by the U.S. attorney, or if the investigation revealed that it was not within the investigative jurisdiction of the bureau.

Ms. LEROY. It's my understanding that well over 50 percent of FBI investigations are declined for prosecution by the U.S. attorney. That means there's an enormous repository of files in the field office that are not sent to headquarters. Is that correct?

Mr. ANDREWS. I'm not familiar with that figure or that ratio. I couldn't comment on what portion is turned down. I don't know.

Ms. LEROY. Well, could I ask the witnesses to supply that information for the record at a later date?

Mr. MICHEL. I think what Mr. Andrews referred to was the circumstance where there is really little, if any, investigation that occurs because very early on there is a review with the U.S. attorney for a judgment on the basis of what you could call a case stated as to whether the facts about which there wasn't much debate instituted a violation of the Federal law or not. And in this circumstance, where it is so clear on the basis of that kind of preliminary picture of the facts that there isn't or couldn't be a Federal violation, that there is then

no extensive or ongoing investigation in those instances, there is no headquarter file. But if there is a full investigation that goes on for a period, as I understand it, there is a headquarters file, even if at the end of a 2-year investigation on a close call, as a matter of prosecutorial discretion, the U.S. attorney or his assistant decides that even though there is a "technical violation," that weighing all the factors that prosecutors can and do and should weigh, that there ought not to be a prosecution.

So it's like an unsubstantiated file. It's a file that doesn't really amount to a full investigative file at all.

Mr. ANDREWS. I did not mean to mislead you. I misunderstood what you were saying. I agree with Mr. Michel. I was talking about files in which there is relatively very little information.

Ms. LEROY. You're not talking about files that were presented to the U.S. attorney and declined?

Mr. ANDREWS. No, ma'am. No, ma'am. You have a prosecutor sign the report which is prepared and presented for prosecution purposes. Now that determination would become a permanent record.

Ms. LEROY. I have no further questions.

Mr. EDWARDS. Thank you very much.

[Whereupon, at 4:15 p.m., the hearing was adjourned.]

## LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, NOVEMBER 15, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 9:30 a.m. in room 2237 of the Rayburn House Office Building, the Honorable Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, and Sensenbrenner.

Staff present: Catherine A. LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning we are going to continue our hearing on H.R. 5030, the proposed legislative charter for the FBI. This hearing marks the beginning of a careful examination of an issue that goes to the heart of the charter: How to assure compliance with the charter. If we cannot assure ourselves that the charter is being complied with, once it is enacted, then we will have accomplished very little through this exercise.

To set the most stringent standards and requirements for FBI activity means little if there is no way for either the FBI Director, the Attorney General, or the Congress to find out if those standards have been adhered to. The Constitution, after all, has always applied to the FBI. Indeed, in seeking a charter, we are asking no more than that the Bureau abide by the Constitution and laws of the United States. We are engaged in this process because it has become clear that the Bureau has not always done so.

A careful system of internal and external review and accountability is the best way to accomplish our goal. Our Government is based on the notion that a system of checks and balances assures that each instrumentality of Government follows the rules. The FBI is no different.

I am not suggesting, however, that any responsibility be taken away from the FBI. The decisionmaking process in all cases must begin in the Bureau. To do otherwise would be to disrupt unduly its legitimate law enforcement activities. But there must be mechanisms, not only for internal review, but external as well.

Our system of checks and balances does not mean that Congress or the Attorney General or the courts must be privy to every decision, all files and records of the FBI. None of those entities is above reproach. Indeed, they have all acquiesced in—or worse—instigated many of the Bureau's worst moments.

The only solution is a combination of all the different possibilities: internal review and discipline within the FBI, participation in and review by the Justice Department in the more sensitive areas and investigations, Congressional oversight and ultimately judicial scrutiny. Only through reliance on all these mechanisms can effective management and oversight of the Bureau be accomplished.

The subcommittee's task over the next three or four hearings is to determine whether the charter, in fact, contains such a system, whether it already exists, or whether such a system should be institutionalized in the charter.

We begin today where any such system must begin, with the concept of internal mechanisms for control and internal discipline. Our first witness today should be able to provide us with considerable insight in this area.

Glen Murphy is director of the Bureau of Governmental Relations and Legal Counsel for the International Association of Chiefs of Police. The IACP has put together one of the most comprehensive documents ever published in the field of internal discipline entitled "Managing for Effective Police Discipline."

Mr. Murphy, the subcommittee welcomes you.

Without objection, your full statement will be made a part of the record.

[The complete statement follows:]

**STATEMENT OF GLEN R. MURPHY, DIRECTOR, BUREAU OF GOVERNMENTAL RELATIONS AND LEGAL COUNSEL, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE**

I would wish, at the outset, to convey our appreciation for having been granted this opportunity to appear before the House committee to express the views of the International Association of Chiefs of Police (IACP) as they relate to the creation of an FBI statutory charter.

The International Association of Chiefs of Police is a voluntary professional organization established in 1893. It comprises chiefs of police and other law enforcement personnel from all sections of the United States and 63 foreign nations. Command personnel in the United States make up over 80 percent of the Association's more than 11,000 members.

Since its inception, the IACP has endeavored to achieve and promote conscientious and effective law enforcement in the interests of community improvement, conservation of the peace, and the maintenance of domestic order. The IACP has always sought to achieve these objectives in full accord with the Constitution and laws of the United States, and has been continually devoted in all of its activities to the advancement of this nation's welfare. By means of improving communication and facilitating cooperation between regional law enforcement organizations, the IACP has encouraged a high degree of professionalism within the field. As a result of many of these activities, we have developed a keen sensitivity to many of the problems and concerns which have come to occupy the attention of police officers and administrators at the state and local levels. For this reason, we believe that the IACP is in a unique and particularly advantageous position to address the subject matter of this inquiry—the extent to which the proposed FBI statutory charter will affect law enforcement at the state and local levels. The views expressed herein do not merely reflect a particular orientation; rather, they are representative of an attitude which is shared by a majority of the membership of the Association.

As it is written, we do not perceive the proposed FBI charter as having any significant deleterious effect upon the capabilities of state and local law enforcement organizations. It is unlikely, as well, that the creation of express statutory authority for the operation of the FBI will have any ostensible beneficial effect upon such capabilities. This is an FBI charter. It is not a uniform state and local police charter, nor is it intended to govern the activities of any other federal law enforcement organization. Nowhere on the face of the legislation nor in any of the sup-

porting documents is there evidence of any intent to enlarge the duties of the FBI in such a way as to impair the ability of state and local police departments to deal with characteristically state and local law enforcement problems.

It would be a mistake to assume, however, that the FBI charter will have no beneficial impact upon state and local law enforcement whatsoever. The proposed legislative guidelines will encourage public confidence and cooperation with regard to the activities of the FBI. Cooperation and the maintenance of a bilateral climate of assistance is one of law enforcement's most important assets. It is more than likely that this public confidence will, by virtue of the leadership position of the FBI, filter throughout the law enforcement community and thereby affect, albeit indirectly, the degree of cooperation afforded by the public to the state and local members of the law enforcement family. Furthermore, the success of such a charter may encourage state and local authorities to enact or promulgate similar guidelines. As a practical matter, state and local law enforcement organizations have traditionally relied upon either statutes or ordinances for express authorization to conduct investigations and perform their state and local law enforcement duties. We are not, therefore, advocating the wholesale adoption of such a charter by state and local police departments.

It has been noted, and should be reemphasized, that this is an FBI charter and that it neither purports nor evidences an intention to affect the ability of local law enforcement organizations to deal with unique regional problems. The charter as it is written, will have a truly significant impact in filling a recognized legislative void. The Bureau's investigative responsibilities and the means by which those duties may be discharged have unfortunately evaded codification to the extent which has here been proposed. The FBI, lacking express legal authority, has had to rely upon the "confusing countours of inherent power." That so few problems have been encountered where the Bureau has been compelled to rely upon such ephemeral and uncertain legal concepts is truly a tribute to the sensitivity of the FBI and its employees. In order to avoid future misunderstandings related to the investigative authority of the FBI and the means by which it may accomplish its investigative objectives, the drafters of this charter have wisely included a number of provisions intended to delineate and clarify these duties and thereby encourage confident and efficient law enforcement.

We believe that the FBI charter, as written, has balanced the various policy considerations which attend the use of informants in a way which is both sensitive and workable. The proposed charter, by requiring authorization at a level related to the nature of the informant's activities, through documentation, supervision, and periodic review, has both maintained the important function of the informant within the law enforcement community and effectively minimized the risks which attend the use of such a sensitive investigative technique.

It would be a mistake to assume that the requirement of a judicial warrant system regarding the use of informants would make this process either more workable or effective. Both the wide range of activities engaged in by informants and the varying degree to which individual informants have chosen to deal with governmental officials would make it impracticable for a judge or magistrate to determine the propriety of the government's choice of an informant or of that informant's conduct. The relationship of an informant to his or her control agent is frequently of a dynamic and continuing nature. While judges and magistrates are clearly necessary where search and arrest warrants are involved, and have attained a degree of expertise in authorizing searches and arrests based upon the particular facts contained within an affidavit, they clearly have neither the time nor the ability to authorize, oversee, and supervise the complex and ongoing relationship between an informant and his or her control agent.

The proposed legislative charter does not purport to create a detailed and comprehensive handbook of procedure applicable to every possible contingency. The charter defines and limits the authority and responsibilities of the FBI in such a way as to provide for minimum limitations upon the Bureau's investigative powers. It is assumed, and in many instances required, that supplemental guidelines will be promulgated by the Attorney General and Director. These additional guidelines may provide for further limitations upon the Bureau's powers and responsibilities. The charter, as written, is not so detailed as to quickly become obsolescent and unworkable. We believe that its drafters have codified an essential, skeletal, and flexible framework which may be supplemented, interpreted, or amended by the promulgation of guidelines, judicial interpretation, or legislative act. To have included more specific provisions within the charter itself would have been unwise. Not only have the duties and the jurisdiction of

the FBI been considerably enlarged, but its investigative methods and priorities have undergone significant changes as well.

The FBI has been compelled to adapt its investigative methods to deal with an increasingly resourceful and well-organized type of criminal. Many of the techniques which are employed routinely today could not even have been imagined ten years ago. It is essential, therefore, that the FBI not be legislatively precluded from dealing with criminal activity which may arise in the future and which may require the utilization of novel investigative techniques. Guidelines regulating the use of such techniques would clearly be necessary, yet it would be dangerous to unnecessarily limit the Bureau's ability to investigate certain sorts of criminal activity before the need has actually arisen and the policy arguments evaluated in light of the exigencies of the situation.

The charter, as written, is essentially enabling legislation. It both assumes and requires the promulgation of guidelines by the Attorney General. It is anticipated that the traditional oversight activities and functions of the Congress and the courts will continue to ensure that the policy objectives envisioned by the charter will be realized. The charter is not intended to enlarge the jurisdiction of the FBI or to affect the duties or responsibilities of the other federal law enforcement agencies. Nor should the charter be interpreted as affecting the substantive criminal law. By providing the employees of the FBI and the public with a document such as this, the legislature could make a significant contribution toward the modernization of the law of prearrest procedure as it applies to the FBI. Were the proposed charter more specific and particular in its provisions, not only would the essential elements of flexibility and clarity be compromised, but the ability of the FBI to respond to unanticipated varieties of criminal activity in an aggressive and affirmative manner would be impaired as well. The ability of the FBI to conduct itself with confidence in the future is a matter of paramount importance and should be guided by responsible regulation and directive rather than foreclosed by unnecessarily restrictive legislation.

As have been noted, we do not perceive the proposed legislative charter as significantly affecting the capability of state and local law enforcement organizations to deal with state and local law enforcement problems. Elementary notions of federalism, as recently expressed by the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), indicate that the ability of the states to structure and administer operations in areas where the states have traditionally done so should not be infringed. In *Usery*, it was made clear that the Congress would not be permitted to alter, affect, or displace the abilities of the states to structure employer-employee relationships in the essential service and public safety areas. Although the charter does not contain the limiting language which appears or has appeared in similar legislative proposals, it is clear that there has been no attempt to enlarge the jurisdiction of the Bureau in such a way as to create a national police force.

We do not advocate the use of special committees made up of state and local governmental representatives in order to inform and advise the Attorney General or the Director regarding the propriety of guidelines promulgated pursuant to the charter. The establishment of such committees would be unnecessary for several reasons. The IACP maintains committees which represent a broad cross-section of its membership. These committees, which are composed of delegates drawn from both large and small law enforcement organizations, meet with the Attorney General on a regular basis. During the course of these meetings, we are afforded the opportunity to make recommendations and provide a significant amount of input with regard to the promulgation of guidelines. We are concerned, for example, with § 533c(b) of the proposed charter which provides that the FBI may, pursuant to guidelines established by the Attorney General, disseminate information obtained during an investigation to a state or local criminal justice agency. We do not believe, however, that it would be either necessary or appropriate to insist upon the establishment of another layer of bureaucracy to accomplish what we have been doing in an informal manner for years. It is unlikely that a citizens committee would possess either the expertise or the experience which would be required in order for such a committee to provide a meaningful contribution to those responsible for the drafting of guidelines in these particularly important areas. Furthermore, the Attorney General is accountable to the Executive, who is in turn accountable to the citizenry. In the remote event that the guidelines which are promulgated pursuant to the proposed charter are received unfavorably, it is clear that such problems could be effectively addressed by means of the traditional use of the political process.

Section 535d(4) of the proposed charter provides that the FBI may, as a special service function, "provide investigative assistance to other Federal, State, or local law enforcement agencies in criminal investigations when requested by the heads of such agencies if the Attorney General or his designee finds that such assistance is necessary and would serve a substantial Federal interest." Although it is not clear exactly what is meant by the words "substantial Federal interest," we believe that this clause, together with the requirement that FBI assistance be solicited by the head of a state or local law enforcement agency, is sufficient to appropriately safeguard the jurisdictional integrity of regional law enforcement organizations. The drafters of the charter have agreed that the term "substantial Federal interest" is nebulous and may require qualification. We are looking forward to a resolution of this issue in the near future. FBI intervention may be necessary in certain isolated circumstances, and state and local law enforcement authorities must be able to request FBI assistance where such is the case. We believe that this section has been drafted with appropriate thought and safeguards. It provides for FBI assistance at the request of state or local authorities, yet limits the ability of regional organizations to do so by requiring the approval of the Attorney General, thereby insulating state and local law enforcement authorities from political pressure to request FBI assistance. On the other hand, this section also protects state and local law enforcement organizations from unwarranted FBI intervention in that no such activity may be engaged in absent a request for assistance.

Section 536(1) of the proposed charter authorizes the FBI to "establish, conduct, or assist in conducting programs to provide education and training for its employees and for law enforcement and criminal justice personnel of other Federal agencies, State or local agencies, and foreign governments and members of the Armed Forces of the United States." This is intended, in part, to fill the void to be left by repealed Section 404 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3744). We would prefer that Section 536(1) contain limiting language such as that which appears in 42 U.S.C. § 3744(a)(1), and 42 U.S.C. § 3744(a)(3). By requiring a state or local law enforcement organization to request FBI assistance regarding the educational, training, or research aspects of its operation, unwarranted intervention could be avoided in this area as well. As it appears that 42 U.S.C. § 3744 would be repealed were the charter to be enacted as written, we would encourage the committee to consider the inclusion of limiting language here, similar to that which may be found at 42 U.S.C. § 3742(b)(6), to the effect that "[s]uch training activities shall be designed to supplement and improve rather than supplant the training activities of the State and units of general local government." Although we would prefer the inclusion of such language, we do not believe that the charter evidences any intention to undermine the traditional role of state and local governments to provide support functions for regional law enforcement purposes. As a practical matter, FBI support resources are limited and are ordinarily only made available where they have been sought. Section 536(b) of the proposed charter, which qualifies section 536 as to technical assistance, does contain limiting language to the effect that such FBI assistance would only be provided upon solicitation by a state or local law enforcement organization. Finally, this section deals with support functions and not with investigative authority, and FBI intervention is ordinarily not only welcomed in this area, but also represents less of a threat to the ability of state and local law enforcement organizations to deal with criminal investigative matters within their own jurisdictions.

The FBI charter, as it is presently written, contains a nonlitigability provision which wisely precludes the use of the charter as creating a new civil cause of action against the United States, its officers, agents, and employees. For the drafters to have omitted such a provision would have been antagonistic to the most important policy objective sought by the charter, the promotion of confident and affirmative law enforcement. The number of civil actions brought by private citizens alleging police misconduct has increased dramatically within the past decade. The law has afforded an extraordinary number of remedies for the citizen who has been aggrieved as a result of improper police activity. A law enforcement officer who, let us say, has wrongfully assaulted a private citizen, may (1) become the object of criminal charges commenced in state court, (2) be sued in a civil action for money damages in state court, (3) be charged in federal court for criminally violating the civil rights of the citizen under 18 U.S.C. § 241, (4) be sued in a civil action in federal court for having violated the constitutional rights of the citizen under 42 U.S.C. § 1983, and, (5) be subjected to internal disciplinary

sanctions and procedures at the hands of his employing agency. As though this were not enough, Section 537(a) of the proposed charter provides for additional administrative sanctions which may be applicable where provisions of the charter are knowingly violated. The establishment of a new private cause of action would, therefore, not result in a furtherance of any of the legislative objectives envisioned by the charter. The Supreme Court of the United States has become particularly hesitant to imply a private cause of action under federal legislation where such would not be absolutely necessary to further the purposes of that legislation. It is clear, in this instance, that a variety of remedies, deterrents, and sanctions already exist to ensure that the objectives sought by the charter will be realized. Any additional private causes of action would, therefore, not only constitute mere surplusage, but also undermine the objective of confident, responsible, and effective law enforcement which the charter seeks to attain.

By definition, 42 U.S.C. § 1983 applies to actions "under color of state law." The courts have interpreted this to mean that the conduct of federal law enforcement officials does not fall within this rubric and have held that § 1983 does not apply to federal officers and employees. It is clear, nevertheless, that a variety of remedies are still available to plaintiffs who claim to have been injured as a result of the improper conduct of federal law enforcement employees. It has been held that a federal officer could be sued under § 1983 where he or she had assisted state officers who had themselves acted under color of state law. *Kletschka v. Driver*, 411 F.2d 436 (2nd Cir. 1969). Furthermore, the United States Supreme Court has made it clear, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), that a cause of action, derived from the Constitution itself, exists in order to provide the victims of the improper conduct of federal officials with an effective means of redress. Although the Court, in *Bivens*, was concerned only with a deprivation of rights guaranteed by the Fourth Amendment, subsequent cases have applied this holding to other constitutional rights, including those secured by the Thirteenth and Fourteenth Amendments. These decisions have consistently held that federal law enforcement officers do not have absolute immunity from damage suits charging violations of constitutional rights. For an officer to be immune he must show that he is performing a "discretionary act at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." As was made clear by the court of appeals in *Bivens*, the making of arrests and other routine law enforcement duties are not deemed to be discretionary functions for these purposes.

The succession of case law which has been generated by the Supreme Court's decision in *Bivens* has attempted to clarify and delineate those situations in which a federal law enforcement agent may become the object of an action brought by an individual plaintiff alleging the wrongful deprivation of constitutionally guaranteed rights. We believe that it would be inappropriate for the Congress to attempt to fashion broad enabling legislation where the courts have already devised a number of remedies which are currently available to individuals alleging injury and which have resulted from a process of actual case by case analysis. The courts have not yet completed their delineation of the scope of the right afforded by the *Bivens* decision, and it would be inappropriate to charge the legislature, at this point, with the responsibility which the courts have carefully and sensitively undertaken.

Furthermore, the effect of the internal sanctions which already exist should not be underestimated. It is noteworthy that no action has been successfully maintained against an agent or employee of the FBI for any constitutional tort since the establishment of such a remedy in the *Bivens* decision. This is truly a tribute to the effectiveness of the existing disciplinary sanctions which govern the conduct of FBI agents and employees. The additional administrative deterrent provided by Section 537(a) of the proposed charter should serve to augment this disciplinary scheme with specific regard to the charter. It should also be reemphasized, at this point, that the proposed charter anticipates the continued vigilance of the Congress in fulfilling its traditional oversight function.

If, in spite of the fact that five distinct civil and criminal remedies as well as a variety of administrative sanctions already operate to ensure that FBI agents will properly perform their duties, the Congress should deem it appropriate that still another remedy should be afforded, it would nevertheless be unwise to include such a provision in the proposed charter. Not only would such a provision not apply to the agents and employees of the other federal law enforcement agencies, but such a provision would, as has been noted, undermine the most important policy objective which the charter seeks to attain, the promotion of confident, affirmative, and accountable law enforcement at the federal level.

We believe that the proposed FBI charter represents a significant, necessary, and long overdue step toward the improvement and modernization of what is already one of the finest and most professional law enforcement organizations in the world. The proposed charter effectively balances the policy considerations which have been expressed by both the public and the FBI, and represents, as it is written, a workable, flexible framework which, when supplemented by guidelines promulgated by the Attorney General, should constitute a significant legislative achievement. We endorse and look forward to the prompt enactment of the charter as it has been proposed.

Mr. EDWARDS. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman. I just want to welcome our distinguished visitor and thank him for his testimony. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Murphy, you may proceed.

**TESTIMONY OF GLEN R. MURPHY, DIRECTOR, BUREAU OF GOVERNMENT RELATIONS AND LEGAL COUNSEL OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE**

Mr. MURPHY. Thank you. I will highlight my testimony as you suggest and not read it all.

For the record, I am Glen Murphy, legal counsel for the International Association of Chiefs of Police. I have been a police officer in two major cities in the United States and have been with the IACP for over 15 years.

The IACP, International Association of Chiefs of Police, as the chairman knows, is a voluntary professional organization and not a new one; it was established in 1893. It comprises chiefs of police and other law enforcement personnel from all sections of the United States and 63 foreign nations. Our association is made up of command personnel, and there are over 80 percent of our 11,000 members that come from the United States.

The association is a not-for-profit research and education corporation and works through a series of committees and elected officials, all who are active law enforcement officers in the United States. So the views that I express here do not merely reflect a particular orientation, but, rather, they are representative of an attitude which is shared by the majority of the membership and certainly the vast majority of local and State law enforcement in the United States.

As it is written, we do not perceive the proposed FBI charter as having any significant adverse effect upon the capabilities of State and local law enforcement organizations. It is unlikely, as well, that the creation of express statutory authority for the operation of the Bureau will have any ostensible beneficial effect upon such capabilities.

This is, and appropriately is, an FBI charter. It is not a uniform State or local police charter, nor is it intended to govern the activities of any other Federal law enforcement organization. Nowhere on the face of the legislation nor in any of the supporting documents is there evidence of any intent to enlarge the duties of the FBI in such a way as to impair the ability of State and local law enforcement agencies to deal with characteristically State and local law enforcement problems.

It would be a mistake, I think, however, to assume that the FBI charter will have no beneficial impact upon State and local law enforcement whatsoever. The proposed legislative guidelines will encourage public confidence and cooperation with regard to the activities of the

FBI. Cooperation and maintenance of a bilateral climate of assistance is one of law enforcement's most important assets.

It has been noted and should be reemphasized that this is an FBI charter and that it neither purports nor evidences an intention to affect the ability of local law enforcement organizations to deal with unique regional problems. The charter, as it is written, will have a truly significant impact in filling a recognized legislative void. The Bureau's investigative responsibilities and the means by which those duties may be discharged have unfortunately evaded codification to the extent which has here been proposed.

The FBI, lacking express legal authority, has had to rely upon the confusing contours of inherent power. That so few problems have been encountered where the Bureau has been compelled to reply upon such ephemeral and uncertain legal concepts is truly an attribute and should be attributed to the sensitivity of the FBI and its employees.

We believe, the IACP believes that the FBI charter, as written, has balanced the various policy considerations which attend the use of informants in a way which is both sensitive and workable. The proposed charter, by requiring authorization at a level related to the nature of the informant's activities through documentation, supervision, and periodic review, has both maintained the important function of the informant within the law enforcement community and effectively minimized the risk which attend the use of such a sensitive and necessary investigative technique.

The proposed legislative charter does not purport to create a detailed and comprehensive handbook of procedure applicable to every possible contingency. We think this is appropriate. The charter defines and limits the authority and responsibilities of the FBI in such a way as to provide for minimum limitations upon the Bureau's investigative power. It is assumed and in many instances required that supplemental guidelines will be promulgated by the Attorney General and the Director. These additional guidelines will provide for further limitations upon the Bureau's powers and its responsibilities.

The FBI has been compelled to adapt its investigative methods to deal with an increasingly resourceful and well-organized type of criminal. Many of the techniques which are employed routinely today could not have been imagined 10 years ago. It is essential, therefore, that the FBI not be legislatively precluded from dealing with criminal activity which may arise in the future and which may require the utilization of novel investigative techniques. Guidelines regulating the use of such techniques would clearly be necessary, yet it would be dangerous to unnecessarily limit the Bureau's ability to investigate certain sorts of criminal activity before the need has actually arisen and the policy arguments evaluated in light of the exigencies of the situation.

The charter, again, as written, is essentially an enabling legislation. It both assumes and requires the promulgation of guidelines by the Attorney General. It is anticipated that the traditional oversight activities—and I would like to highlight this—the oversight activities and functions of the Congress and the courts will continue to insure that the policy objectives envisioned by the charter will be realized.

The charter is not intended to enlarge the jurisdiction of the Bureau or to affect the duties or responsibilities of the other Federal law enforcement agencies, nor should the charter be interpreted as affecting

the substantive criminal law. By providing the employees of the FBI and the public with a document such as this, the legislature could make a significant contribution toward the modernization of the law of prearrestment procedure as applies to the FBI.

Were the proposed charter more specific and particular in its provisions, not only would the essential elements of flexibility and clarity be compromised, but the ability of the FBI to respond to unanticipated varieties of criminal activity in an aggressive and affirmative manner would be impaired as well. The ability of the FBI to conduct itself with confidence in the future is a matter of paramount importance and should be guided by responsible regulation and directive rather than foreclosed by unnecessary restrictive legislation.

We do not perceive the proposed legislative charter as significantly affecting the capability of State and local law enforcement agencies to deal with State and local law enforcement problems. Elementary notions of federalism, as recently expressed by the U.S. Supreme Court in *National League of Cities versus Uesery*, indicated that the ability of States to structure and administer operations in areas where the States have traditionally done so should not be infringed. In *Uesery*, it was made clear that the Congress would not be permitted to alter, affect, or displace the abilities of the States to structure employer-employee relationships in the essential service and public safety areas.

Although the charter does not contain the limiting language which appears or has appeared in similar legislative proposals, it is clear that there has been no attempt to enlarge the jurisdiction of the Bureau in such a way as to create a national police force.

Therefore, we do not advocate the use of special committees made up of State and local governmental representatives in order to inform and advise the Attorney General or the Director regarding the propriety of guidelines promulgated pursuant to the charter. The establishment of such committees would be unnecessary for several reasons. First and foremost, the IACP maintains committees which represent a broad cross-section of its membership which is 80 percent of the law enforcement in the United States and all of the major cities and all of the State police agencies. These committees, which are composed of delegates from both large and small and State law enforcement agencies, meet with the Attorney General on a regular basis.

During the course of these meetings, which I attend, we are afforded the opportunity to make recommendations and provide a significant amount of input with regard to the promulgation of guidelines. We are concerned, for example, with section 533c(b) of the proposed charter which provides that the FBI may, pursuant to guidelines established by the Attorney General, disseminate information obtained during an investigation to a State or local criminal justice agency.

We do not believe, however, that it would be either necessary or appropriate to insist upon the enlistment of another layer of bureaucracy to accomplish what we are already doing through an informal manner for years. It is unlikely that a citizen's committee would possess either the expertise or the experience which would be required in order for such a committee to provide a meaningful contribution to those responsibilities for the drafting of guidelines in these particularly important areas.

Furthermore, the Attorney General is accountable to the Executive, who is in turn accountable to the citizenry. In the remote event

that the guidelines which are promulgated pursuant to the proposed charter are received unfavorably, it is clear that such problems could be effectively addressed by means of the traditional use of the political process as well as congressional oversight.

The proposed charter provides that the FBI may, as a special service function, provide investigative assistance to other Federal, State, or local law enforcement agencies in criminal investigations when requested by heads of such agencies if the Attorney General or his designee finds that such assistance is necessary and would serve a quote, substantial Federal interest, unquote. Although it is not exactly clear what is meant by the words "substantial Federal interest," we believe that this clause, together with the requirement that the FBI assistance be solicited by a head of State or local law enforcement agency, is sufficient to appropriately safeguard the jurisdictional integrity of regional law enforcement organizations.

The drafters of the charter have agreed that the term "substantial Federal interest" is nebulous and may require qualification. We are looking forward to the resolution of this issue, and I am talking to the FBI about this now. FBI intervention may be necessary in certain isolated circumstances, and State and local law enforcement authorities must be able to request FBI assistance where such cases are necessary.

Section 536(1) of the proposed charter authorizes the FBI to establish, conduct, or assist in conducting programs to provide education and training for its employees or for law enforcement and criminal justice personnel in other Federal agencies. As has been noticed in prior testimony, there is, in the Omnibus Crime Control and Safe Streets Act of 1968, there is limiting language that it not supplant local law enforcement areas. We concur with that recommendation; however, even though we prefer the inclusion of that language, we do not believe that the charter evidences any intention to undermine the traditional role of State and local law enforcement functions in the area of training.

We feel that law enforcement needs enough training that we don't want to preclude or exclude anyone from the training field, even though we are very heavily involved in it ourselves.

The FBI Charter, as it is presently written, contains a nonlitigability provision which wisely precludes the use of the charter as creating a new civil cause of action against the United States, its officers, agents, and employees. For the drafters to omit such a provision would have been antagonistic to the most important policy objective sought by the charter, the promotion of confident and affirmative law enforcement. The number of civil actions brought by private citizens alleging police misconduct has increased dramatically in the past decade—as a matter of fact, over 600 percent.

The law has afforded an extraordinary number of remedies for the citizen who has been aggrieved as a result of improper police activity. A law enforcement officer, let us say, who has wrongfully assaulted a private citizen, may (1) become the object of criminal charges commenced in the State court, (2) be sued in civil action for money damages in the State court, (3) be charged in a Federal court for criminally violating the civil rights of the citizen under U.S.C. 241, (4) be sued in a civil action in Federal court for having violated the constitutional rights of the citizen under 42 U.S.C. 1983, and (5), and

maybe more significantly, be subjected to the internal discipline sanctions and procedures at the hands of his employing agency, which generally would mean dismissal from his place of employment.

As though this were not enough, section 537(a) of the proposed charter provides for the additional administrative sanctions which may be applicable where provisions of the charter are knowingly violated. The establishment of a new private cause of action would, therefore, not result in a furtherance of any legislative objectives envisioned by the charter.

The Supreme Court of the United States has been particularly hesitant to apply a private cause of action under Federal legislation where such would not be absolutely necessary to further the purposes of legislation. It is clear, in this instance, that a variety of remedies, deterrents, and sanctions already exist to insure that the objectives sought by the charter may be realized. Any additional private causes of action would, therefore, not only constitute mere surplusage, but also undermine the objective of confident, responsible, and effective law enforcement which the charter seeks to attain.

By definition, 42 U.S.C. 1983 applies to actions under the color of State law. The courts have interpreted this to mean that the conduct of Federal law enforcement agencies does not fall within the rubric and have held that 1983 does not apply to Federal officers and employees. It is clear, nevertheless, that a variety of remedies are still available to plaintiffs who claim to have been injured as a result of improper conduct of Federal law enforcement agencies.

It has been held that a Federal law enforcement officer could be sued under 1983 where he or she has assisted State officers who had themselves acted under the color of law in the *Driver* case. Furthermore, the U.S. Supreme Court has made it clear, in *Bivens*, that a cause of action derived from the Constitution itself exists in order to provide the victims of improper conduct of Federal officers with an effective means of redress.

Although the Court, in *Bivens*, was concerned only with the deprivation of rights guaranteed by the fourth amendment, subsequent cases have applied this holding to other constitutional rights in constitutional torts, including those secured by the 13th and 14th amendments. These decisions have consistently held that Federal law enforcement officers do not have absolute immunity from damage suits charging violations of constitutional rights. For an officer to be immune, he must show that he is performing a, "discretionary act at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." As made clear by the court of appeals, in *Bivens*, the making of arrests and other routine law enforcement duties are not deemed to be discretionary functions for these purposes.

The succession of case law which has been generated by the Supreme Court's decision in *Bivens* has attempted to clarify or delineate those situations in which a Federal law enforcement agent may become the object of an action brought by an individual plaintiff alleging the wrongful deprivation of constitutionally guaranteed rights. We believe that it would be inappropriate for the Congress to attempt to fashion broad enabling legislation where the courts have already devised a number of remedies which are currently available to individuals alleging the injury and which have resulted from a process of actual case-by-case analysis.

The courts have not yet completed their delineation of the scope and the right afforded by the *Bivens* decision, and it would be inappropriate to charge the legislature, at this point, with the responsibility which the courts have carefully and sensitively undertaken.

Furthermore—and I think more important—the effect of the internal sanctions which already exist should not be underestimated. It is noteworthy that no action has been successfully maintained against an agent or employee of the FBI for any constitutional tort since the establishment of such a remedy in the *Bivens* decision. This is truly a tribute to the effectiveness of the existing disciplinary sanctions which govern the conduct of FBI agents and certainly have been realigned and redesigned by Director Webster.

The additional administrative deterrent provided by section 537(a) of the proposed charter would serve to augment this disciplinary scheme with specific regard to the charter. It should also be reemphasized, at this point, that the proposed charter anticipates the continuing vigilance of Congress in fulfilling its traditional oversight function.

If, in spite of the fact that five distinct civil and criminal remedies as well as a variety of administrative sanctions already operate to insure that FBI agents will properly perform their duties, the Congress should deem it appropriate that still another remedy should be afforded, it would nevertheless be unwise to include such a provision in this proposed charter. Not only would such a provision not apply to the agents and employees of the other Federal law enforcement agencies and other Federal agencies, but such a provision would, as he has been noted, undermine the most important policy objective which this charter seeks to attain. And that is the promotion of confident, affirmative, and accountable law enforcement at the Federal level.

The International Association of Chiefs of Police believes that the proposed charter represents a significant, necessary, and perhaps long-overdue step toward the improvement and modernization of what is already one of the finest and most professional law enforcement organizations in the world. The proposed charter effectively balances the policy considerations which have been expressed by both the public and the FBI and represents, as it is written, a workable, flexible framework which, when supplemented by guidelines promulgated by the Attorney General, would constitute a significant legislative achievement. We endorse and look forward to the prompt enactment of the charter as it has been proposed.

I thank you for the opportunity.

Mr. EDWARDS. Thank you, Mr. Murphy.

I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman and thank you, Mr. Murphy. I wonder how you would react to the proposal that is going to be made later today by Mr. Douglass Cassel that there be a provision, a civil remedy designed to protect only those persons and groups engaged in lawful political or religious activity. This is the source of all of the embarrassment to all of us and to the FBI. They did spy on alleged subversives and extremists, and it seems to me that the FBI, if they want to restore their tarnished image, would welcome a suit that would be available to people who are engaged in lawful

political and religious activities and who have been infiltrated by the FBI.

How would you respond to that?

Mr. MURPHY. Well, Father Drinan, I, in my testimony, indicated that I think the kinds of remedies, civil court remedies that are appropriate against the individual officers now exist. In addition to the time that we are talking about, a number of administrative guidelines have been put in effect.

Mr. DRINAN. What could Jean Seberg's people have done if they discovered that last month?

Mr. MURPHY. Last month, under the way I now understand the FBI's disciplinary system, the administrative charges—

Mr. DRINAN. In civil remedies for her.

Mr. MURPHY. Well, what do we want to do? To make her whole in moneys or do we want to discipline the persons who infringed upon the charter?

Mr. DRINAN. We want to do both, sir.

Mr. MURPHY. Well, then I think, under the existing system, I think there are remedies that could be available to Miss Seberg if she would bring charges.

Mr. DRINAN. They could be, but you yourself admitted since the Bevins decision, not a single one has successfully prevailed against the FBI, and they fought all of them. The law is very obscure. Why doesn't the FBI come forward and say, "We will agree"?

Mr. MURPHY. Well, maybe the evidence in that case was obscure. I think we're making the assumption, you're making the assumption, which I will not make, that necessarily, that the agents who performed were doing something outside the authority that they had at that time. What you are looking for in civil remedies still exists, would be against the individual officer, not against the agency itself. The way that you promulgate discipline against that agency, I might submit, sir, is from your oversight committee.

We have now changed the direction of how long the director of the FBI can serve. It is 10 years, which I think is certainly appropriate. We have promulgated, since the Levi era, a number of administrative guidelines within the Bureau which may have been long overdue; I don't know.

Mr. DRINAN. Mr. Murphy, I can't understand how you and the FBI are so afraid of this new remedy. You can say it is duplicative, try and prove that, but at least we should clarify the remedy. I can't understand why there is such resistance. It gives a very bad impression to the public.

Mr. MURPHY. Don't make the assumption that I am afraid. I am not making a bad impression to the public. If this officer—in my opinion, I am not, and I am certainly not afraid of the civil remedies that are available. You have to remember that I represent State and local law enforcement agencies which traditionally have not had this. But I also have recognized, Father Drinan, the number of spurious lawsuits that are brought in the United States against law enforcement officers, and you have to remember that those individual officers have to defend themselves as do FBI agents.

Sure, you can say that the Attorney General defends them, but in 9 cases out of 10, they have to have private counsel.

Mr. DRINAN. Let me come back to my original question and close with that, again, that I agree with you that there are frivolous suits against law enforcement officers and that is an undesirable thing, and we shouldn't encourage that. What about the proposition that is being made later today by another witness that there should be some remedy for those who discover that their lawful political activities have been infiltrated by the FBI?

Mr. MURPHY. Well, first of all, I have not read that proposal. Second, and I will reiterate, the remedies—if I am active in politics or in even the fringes of politics, I have the defenses available to me in civil courts and in criminal court through injunctive process, all kinds of them.

The Freedom of Information Act gives me things that I didn't have 10 years ago, maybe to a fault; nonetheless, I have those kind of things available to me that I didn't have 10 years ago. And I don't think that we need to go any further in the charter than we have now.

I try to emphasize, I think it is very important that the charter be drafted, but that you not undermine the confidence of the agents out in the street. If we go much further with State and local and Federal law enforcement agencies on what they can and can't do, Father, I am very concerned about the effectiveness of law enforcement in this country.

Mr. DRINAN. I thank you very much. I yield back the balance of my time.

Mr. EDWARDS. Mr. Murphy, we are not legislating just for today. We are trying to legislate for tomorrow, because we don't know who will be in charge tomorrow. Under stress, the first thing to go, often, are constitutional rights. Today, for example, you will find organizations and members of this subcommittee, I might add, who are disturbed about what the Federal Government is doing in selecting students of a particular nationality for restrictions that they do not apply to students of another nationality. You know what I mean.

It harks back to something that happened to the Japanese Americans many years ago. There are no two ways about it, there is a parallel. That is what happens with police organizations, especially Federal police organizations with nationwide power.

I believe your testimony is that although State and local officers do have laws, Federal laws actually, that provide remedies when they violate constitutionally protected rights—namely, 42 U.S.C. 1983 and then 18 U.S.C. 241, 242—so that State and local officers can be prosecuted criminally for violation of constitutional rights, those same restrictions don't apply to Federal officers.

Mr. MURPHY. No; I didn't testify to that. I said, historically, 1983 did not apply to Federal officers; but since the Ku Klux Klan cases and the *Bivens* decision and the series of cases since the *Bivens* decision, I submit, Mr. Chairman, that if Federal officers do now come under any constitutional violation, there is a civil remedy available to them under the *Bivens* decision. I don't think anyone that has studied this at all would dispute that.

It is available now. It was not before *Bivens*. I agree.

Mr. EDWARDS. So you feel then that under present law, if a Federal officer, whether he or she be FBI or DEA or Internal Revenue Service or whatever, violates a constitutionally protected right—we'll say

the right of privacy under the fourth amendment of the constitution—that he or she individually is responsible for damages as well as the Government?

Mr. MURPHY. Well, I intentionally stayed away from the Tort Immunity Act. I have some feelings on the Tort Immunity Act, but I didn't think this was the appropriate time to testify to that. I think, yes; under the *Bivens* decision, the whole series of cases come under that, they specifically named the 14th amendment—they specifically named the 13th amendment—specifically the 14th where we've got the whole due process. I maintain that, yes; they are. And those suits are being brought in those instances where there is alleged deprivation of constitutional rights. They are being brought right now.

I think that there is an aura, if I may, Mr. Chairman, that just because they are not successfully litigated against the Bureau or some Federal agencies, that it is real or imagined that there is something wrong with the system. Well, maybe, and just maybe—and I submit it is the case—maybe the Federal law enforcement agencies are very cognizant of, particularly in the last few years, of the problems of violating people's constitutional rights.

I think the charter is a very important thing in this area where it brings help so the public sees more and more the kinds of authorities and restrictions upon law enforcement agencies, not inappropriate restrictions. Let me submit, again, here is a law enforcement agent who—and those who control and can control and direct vicarious liability, they are equally liable.

Here is a law enforcement agent who has a minimum of four to five remedies available to him, either State or Federal. More significantly, I think the internal discipline—we wrote a book on this, internal discipline within agencies—if you are going to employ a person, the Director of the FBI, then I think it is incumbent upon Congress and the Executive to hold him accountable for the actions of his people. If they start violating constitutional rights of individuals, then I submit that Director Webster is accountable, and I am certain that he would agree with that.

Mr. EDWARDS. How do we know about any violation unless we read about it in the paper?

Mr. MURPHY. I think that the number of complaints that are brought against police officers or FBI agents is not a private matter. That's available to the Congress, as it is—

Mr. EDWARDS. For the record, I must advise you that no internal investigation files of the FBI, to my knowledge, are available to a congressional committee, including complaint files. They are not public either.

Mr. MURPHY. Most of your complaints, Chairman Edwards, that are brought in this area would be brought in the Civil Rights Division of the Justice Department. That's where they are brought.

Mr. EDWARDS. Well, if they are a matter of public record, then, of course, they would be available; certainly no internal discipline matters or violations of constitutional rights or rules and regulations of the FBI are made available to any congressional committee, including this one.

Mr. MURPHY. But they are to the Attorney General.

Mr. EDWARDS. Not necessarily. There are lots of files in the FBI that are not available to the Attorney General.

Mr. MURPHY. Well, some are not, but not personnel files. Personnel files are—

Mr. EDWARDS. I don't know that. The Attorney General and the FBI are part of the Department of Justice, and we are the ones that you suggested should exercise diligent oversight. I'm sure you will agree that it is difficult to exercise diligent oversight if we have no way of knowing what the problems are, unless we read about them in the paper or unless we see that they are a matter of court record.

Mr. MURPHY. Well, again, I will submit, as in local law enforcement, the vast majority, 99 percent of complaints on constitutional violations are submitted to the Department of Justice, Civil Rights Division, which is a public record. That is available to the public. So are the complaints against the FBI agents. As you go through the many cases we've talked about today, those complaints were lodged with the Civil Rights Division of the Justice Department which is a public record.

Just because no one went over there to look at it and said, "The Bureau didn't give me the information," gainsays the issue that I'm getting at; that was a public record. It is a public record, and it continues to be. If some one is complaining against an FBI agent under a basket, then I submit they are not complaining. If they don't come forward and make a complaint to a legitimate source which is available, which Congress has made available to all of us citizens, then are they really submitting a complaint?

They are investigated by the Department of Justice, Civil Rights Division. I might add, as you well know, they go after law enforcement officers diligently, and appropriately so. Someone needs to police the police in this area. That's their responsibility. You gave it to them. Let's hold them accountable for it.

I would submit, instead of saying to the FBI in a violation of constitutional rights, "Why didn't you tell us about it?" I would turn around to the Civil Rights Division and say, "Why didn't you tell us about it?" That's your responsibility. And you are the people who should hold them accountable for that.

Mr. EDWARDS. Thank you. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Murphy, the Civil Rights Division has recommended that there be additional checks on agent misconduct. One of their suggestions made before the Senate Judiciary Committee is this: Inclusion of a civil right of action for recovery of damages for violations of the charter.

How would you react to that? After all, we are creating a charter, and you are calling for more congressional oversight. Perhaps right in the statutory charter we should say, if the FBI violates a section of this charter, there is a civil right of action in the injured person.

Mr. MURPHY. You're developing another right of—I do not view and I think it inappropriate to view the charter as the disciplinary code of the FBI. If you want to hold—

Mr. DRINAN. I'm not saying that, sir. I'm saying that this charter is to protect Americans. If in 5 years from now when all the people in Justice have gone away, some person has his organization or his life surveilled, needlessly, illegally, by the FBI, I want to create a right in him automatically, the charter has been violated and he can, in fact, bring suit.

Mr. MURPHY. He can bring suit now. He doesn't need that in the charter. Why should this be singled out?

Mr. DRINAN. Because they have such a terrible record, and they have brought law enforcement at the Federal level into disrepute. You can't wipe it away and say there is no need to do this. The FBI themselves have said they are begging us for the charter.

Mr. MURPHY. You are misinterpreting my point. I am begging you for the charter also. I agree that the charter should be here, but now to submit another remedy in here on top of it, it would just be more bureaucracy, more duplication of remedies that are already there. If people want to bring lawsuits against the FBI—which was not present under some of the unfortunate past, I grant you that—the courts have already taken care of that.

Mr. DRINAN. Why don't we wipe out the other alleged remedies and put a remedy right in the charter so this is a law with teeth in it?

Mr. MURPHY. Why don't you do it for the entire Executive? Why don't you do it for Congress? Why don't you do it for the Judiciary? Why do it for the FBI alone? That's my point.

Mr. DRINAN. Because only the FBI have come forward and in order to repair their damage—

Mr. MURPHY. May I submit, they are certainly not the only ones who have had any transgressions in the last 10 years.

Mr. DRINAN. Well, I would like to apply the charter to the Drug Enforcement Agency.

Mr. MURPHY. Well, I would like to apply it to Congress and the Executive. We've had some problems there, too. Why single out one agency? Why not, if you are going to do it—

Mr. DRINAN. Because they have come forward, and they said that they want to get out of the state of sin.

Mr. MURPHY. Well, you're a priest and I'm not so I can't hear the confession. I would submit that if you want to do it, do it in a bill for the Government. Don't do it in a bill for one agency. That's not appropriate. Do it where you take everybody into accord. The transgressions of us all, may I say. That's all we're suggesting, where you look at all of the problem, not a little bit of the piece of the problem.

Mr. DRINAN. All right. I thank you very much. I yield back the balance of my time.

Mr. EDWARDS. Ms. LeRoy?

Ms. LEROY. Mr. Murphy, the chairman asked you earlier about remedies available against State and local police—1983, 241 and 242. I am a little unclear about your answer. You seem to be saying that those same remedies are available against Federal officers. but I don't believe that that's the case. Would you explain?

Mr. MURPHY. I know you don't. A lot of people don't; I've read some of the testimony, and I disagree. If you look at the series of decisions after Bivens, the whole series of them, they are applying to Federal agencies.

The Ku Klux Klan case, they have applied to Federal agents, Federal officers and different Federal agencies. If they, for example, in the Ku Klux Klan case, if they were under the color of law, if they participated in the State officers, and we know that, in the Bivens case they said that the 14th amendment applied, the 13th amendment applied, the 4th amendment applied. As I recall, it was specifically the 4th amendment case that they were talking about in Bivens. So now they say that the whole due process law is applicable for a civil suit against the Federal agency. And other cases are enlarging upon that; the court is enlarging upon it every day.

Ms. LEROY. But Bivens is neither a 1983 nor a 241 case.

Mr. MURPHY. I didn't say it was.

Ms. LEROY. Why the Congress shouldn't apply those same standards that apply under 1983, and 241 and 242, to Federal law enforcement agencies as well as State and local officers?

Mr. MURPHY. I think they should. I think they should apply it to Congress itself and the staff, too. See, what you're doing is, again, what you're trying to say is let's apply it to some one group. If Congress wants to apply it to everybody, including the executive branch, the Congress and the Judiciary of this country, let's do it.

For years and years and years, these things have been applicable to State law enforcement agencies and excluding everybody else, and including, I might submit, the Congress. Why? Why don't you do it the right way? Do the whole ball of wax instead of picking out an individual agency? That's all I'm saying is wrong. I don't have problems with remedies. I have a great deal of difficulty when the governments don't support their agencies when they do things in good faith. I have a great deal of difficulty with that, as Congress wants to do.

Mr. DRINAN. Would counsel yield on that? I don't think it's fair to say we are picking out the FBI. We are going to these sensitive agencies, especially in intelligence areas.

Mr. MURPHY. I don't mean just law enforcement. Why don't you do it for Government? If you are going to apply it, why not to Government? That's the point.

Ms. LEROY. The bill that is before the subcommittee is the FBI charter.

Mr. MURPHY. I know, and that's why I am saying, why don't you submit it to all?

Ms. LEROY. Well, leaving that aside for the moment, one of the arguments that the Justice Department raises in not wanting to include separate settlement remedies in the charter itself is that currently pending in this committee are the Federal Tort Claims Act amendments, and they would prefer to see that as the exclusive remedy for all Federal violations.

I wonder if you would comment, I know you said earlier you didn't think it was appropriate, but because they are using that as a reason not to put remedies in this bill, I wonder if you would comment on your views on that bill, please.

Mr. MURPHY. Yes; I would be glad to. I would agree that the tort claims bill would be a much better place for any remedies to be than in the charter. Then it applies to everyone. I have some problems, and only one significant problem—I have some other problems with the Tort Claims Act—but one is that I don't think the Federal Government or any government should ever give up the good faith defense. I think that's a horrible thing, and it's just asking for all kinds of lawsuits.

If you do things in good faith—if you do that, I think that you are going to have such a disastrous effect on law enforcement that it would just be impossible. In addition, I am not sure that the Federal Government can waive the good faith defense of an individual.

Ms. LEROY. Can I just clarify for the record, because I am not sure how familiar everyone is with that bill, the proposed amendments do not give up the good faith defense with respect to individual liability, only with respect to the Government itself.

Mr. MURPHY. Well, yes; but come on, how many cases of these have you tried in the courtroom where the Government said, Well, we give up our good faith and it gets into the record? If we, if the Federal Government gives up good faith defense—and I would like to know why they should in the first place, if it was done in good faith. That doesn't mean you don't give restitution and put the person back in the position that they were in. But why should good faith law enforcement in a democracy be given up by the Federal Government? And the infringement that that has on an individual officer, I think would have such an adverse effect.

Here his boss is saying, We give it up. But the individual, does he have that right then to keep it in his defense as he goes through the four or five administrative steps that are set up in there? I think not. I think that when he gets into the civil courts, he is going to have a problem. That problem, aside, can be remedied. That's our one major objective, and I submit to you that local law enforcement and State law enforcement and even the agents themselves across the country feel that that is one of the most horrible things that could happen. And we will be violently opposed to that. We have testified to that.

But the Tort Claims Act itself is the place to have the remedy, not in the charter. I agree.

Ms. LEROY. The Justice Department also suggests that with respect to enforcing the charter, the primary mechanism ought to be the FBI's own internal discipline system. Obviously, no one doubts either Attorney General Civiletti, or Director Webster's good faith with respect to administering the FBI and assuring that there are no violations of this charter. But, as the chairman said, neither of them is going to be around forever.

Mr. MURPHY. None of us are.

Ms. LEROY. Some concern has been expressed about the possibility that the very best internal discipline system may not operate effectively if those in charge of operating it are not committed to it. For example, the Civil Rights Commission has undertaken a study of a number of the internal discipline systems of local police departments. You may be familiar with the study.

Mr. MURPHY. Extremely.

Ms. LEROY. One of the places that they studied was Philadelphia which has a police department which is in some difficulty with respect to allegations of police brutality.

Mr. MURPHY. Evidently the Federal court feels different.

Ms. LEROY. It is my understanding that the conclusion of the civil rights study is that Philadelphia probably has, on paper, the best internal discipline system in the country and yet there is some conflict over whether that system has been made effective.

Mr. MURPHY. Miss LeRoy, I attempted to work with the Civil Rights Division, and I think I know more or as much as anybody in the United States about internal police discipline. And I certainly know that we talked to that group and tried to talk them into working with State and local law enforcement on internal discipline in the United States.

I am not trying to say that there aren't bad internal discipline systems in the United States. We've come a long way, but we got a long way to go. We recognize that. But to single out one agency and

to say that's law enforcement in the United States is a travesty of justice.

Now, I don't think that you could take any one of them—and certainly, you say, Well, the Justice Department brought a case against Philadelphia, but I also have to submit at this time—and I don't know the Philadelphia system—at this time, the Justice Department lost that suit. And until they are overruled by the appellate court, I think their position is not sustained.

I don't want to comment on the Philadelphia situation, but look at what happened in Houston. You know, they looked at Houston and here's a department that had an atrocious background. But look what Chief Caldwell has done in Houston. In a short period of time, he has turned that agency around, and his internal discipline system is excellent. In the cases that were brought before him, the people were dismissed and civil charges and criminal charges were placed by whom first—by the Houston Police Department, not by the Federal Government. They didn't need to go in there on oversight. That issue was all over by the time they got there.

I submit, if we are going to look at internal discipline systems, let's look at it appropriately. And that was not an appropriate look at internal discipline systems. It looked at two, two systems in the United States, instead of looking at great ones like Los Angeles and Baltimore and others that have had extremely good backgrounds in this area. And they are open systems.

Ms. LEROY. What do you mean by open systems?

Mr. MURPHY. Well, I mean that the system is wide open for anybody to look at, to look at their records. They published their records, and so forth, what they do in their internal affairs, whose cases have been investigated. I think that internal discipline in the United States—and as you know, you have looked at the book that we wrote, the research project that we did on it—even from the period of time that has gone on till now, has improved tremendously. So has the FBI's internal investigation.

I submit, I am weak in this area, and I will have to look at it when I get out of here. Chairman Edwards whet my appetite on what internal records are available on discipline in the Federal agencies. I know most of them are available, are public. I will have to look at the Bureau's. I thought they were, too. I am not sure, so I will have to look at that.

Mr. EDWARDS. If counsel will yield. Of course, if a complaint is filed with the Civil Rights Division of the Department of Justice, I don't even know, does anybody know if that's public if a complaint is filed? Suppose a person doesn't want it made public. I know if the action is filed in court, that is public, of course, but what if it's just a letter of complaint: Dear Drew Days, so and so did this to me and so forth. You mean that Drew Days is supposed to put that in the newspaper if a report comes around?

Mr. MURPHY. If it is not available to him in any other way, it is available under the Freedom of Information Act.

Mr. EDWARDS. We understand that.

Mr. MURPHY. That makes it public record.

Mr. EDWARDS. You are in favor of the Freedom of Information Act?

Mr. MURPHY. Yes. I think it needs correction in minor areas. I am in favor of the charter, too. I keep sounding like I am not.

Ms. LEROY. I have no further questions.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. Mr. Murphy, if I can restate your testimony with regard to constitutional torts, is it your position that constitutional torts under the Tort Claims Act have now been extended to not only fourth amendment violations, but also constitutional torts committed under the fifth and first amendments; is that correct?

Mr. MURPHY. Yes.

Mr. BOYD. Are you familiar with the 1974 Ervin-Percy amendments to the Tort Claims Act?

Mr. MURPHY. Not by name.

Mr. BOYD. Well, those amendments, as I understand them, were designed to create individual, joint, and several liability for constitutional torts. Not only were they designed to include the Government as a responsible party, but also the individual.

Mr. MURPHY. Yes.

Mr. BOYD. Moving on to the charter, with regard to the violations which may result from implementation of this charter, is it your position that those violations should be governmentwide and not directed specifically to the FBI?

Mr. MURPHY. Sure.

Mr. BOYD. Thank you. I have no further questions.

Mr. EDWARDS. Are there further questions? -

Mr. Murphy, thank you very much.

Mr. MURPHY. Thank you for the opportunity, gentlemen.

Mr. EDWARDS. Our last witness today is Douglass W. Cassel, Jr., Staff Attorney with Business and Professional People for Public Interest, a public interest group in Chicago concerned about the FBI charter. In his capacity with BPI, Mr. Cassel is and has been involved in litigation with the FBI. His experience will be of assistance to us in deciding whether existing law provides adequate remedies and enforcement mechanisms or whether changes need to be made.

Mr. Cassel, we welcome you. Without objection, your full statement will be made a part of the record.

[The complete statement follows:]

STATEMENT OF DOUGLASS W. CASSEL, JR., STAFF ATTORNEY FOR BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, CHICAGO, ILL., ON FBI CHARTER BILL (S. 1612 AND H.R. 5030) <sup>1</sup>

#### INTRODUCTION

Thank you for the opportunity to testify before your Committee.

My name is Douglass W. Cassel, Jr. I am a staff attorney for Business and Professional People for the Public Interest ("BPI"), a nonprofit law center in Chicago.

BPI's general knowledge concerning FBI investigative practices is based in large part on a review of tens of thousands of pages of FBI domestic intelligence files produced in litigation in the federal court in Chicago. Our perspective is two-pronged. First, we believe it is important that the FBI be able to conduct vigorous and effective investigations of crime. Second, we believe it is equally important to a free society that the FBI not engage in surveillance of lawful political activity.

Most of our specific suggestions propose clarifying amendments to the bill or the commentary. They are designed to articulate more clearly or effectively what

<sup>1</sup> A brief summary of this statement is also being submitted as separate document.

we understand to be a central purpose of the bill: to focus FBI investigations on criminal conduct, not on political activity protected by the First Amendment.

It is of critical importance that the statute be clear; the public cannot rely indefinitely on the good faith of administrators. As the Supreme Court has stressed in the domestic security context, "It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,'" *United States v. Robel*, 389 U.S. 258, 265 (1967).

Specifically, our comments concern:

- (1) The standard for initiating terrorist investigations,
- (2) The standard for investigating future "general crimes,"
- (3) The scope of investigations of political activists and groups,
- (4) Infiltration of political groups,
- (5) Independent audit of FBI informers' activities, and
- (6) A civil remedy for substantial charter violations which will not unduly interfere with ongoing investigations.

## I. THE THRESHOLD STANDARD FOR INVESTIGATING TERRORISTS<sup>3</sup>

### 1. The definition of "terrorist activity" should be clarified

The apparent intent of the more relaxed threshold standard for investigations of "terrorist activity" under § 533(b)(3) of the bill is to ensure adequate security against heinous acts of terrorism such as those committed by groups like the Weathermen. Thus, in illustrating the application of § 533(b)(3), the Commentary refers to kidnappings, assassinations, and bombings.

However, the broad definition of "terrorist activity" in § 531b(14) of the bill is not limited to those grave crimes of political violence commonly thought of as "terrorist": e.g., kidnappings, hijackings, bombings, shootings, and assassinations. It would include, *inter alia*, any "activity that involves a violent act that . . . risks serious bodily harm . . ."

Many minor assaults and batteries might well fit this definition. Thus, if a political demonstrator arrested for disorderly conduct swings his wooden placard at a police officer, he may be labelled a "terrorist" because his action "risks serious bodily harm." Another person at the same demonstration might also be labelled a "terrorist" merely because his "activity" (participating in the demonstration) "involves" the action of the first demonstrator.

We assume the bill is not intended to encompass such minor offenses as "terrorist activity." If it were, it might sweep in, for example, many of the well-meaning students who demonstrated against the Vietnam War, a result that neither Congress nor the American people would intend.

Unfortunately, the examples of serious terrorist activity in the Commentary do not limit the bill's broad definition. On the contrary, the Commentary to § 531b states with presumably unintended breadth, "Terrorist activity" is that which is designed to intimidate or coerce through the use of criminal violence." The later examples of kidnapping, etc., in the Commentary to § 533(b)(3), do not purport to limit the definition of "terrorist activity," and they overlook the fact that in many instances "resisting arrest" or "disorderly conduct" could also fit the definition.

The definition of "terrorist activity" in § 531b(14) should therefore be clarified in two respects.

First, rather than including any violent act that risks bodily harm, it should be limited to "kidnappings, hijackings, bombings, shootings, assassinations, or other violent acts reasonably likely to cause proximate and comparably grave bodily harm or aggravated property destruction and which are punishable by a comparable period of imprisonment under federal law, for the purpose of coercion or intimidation." This approach—listing specific offenses and excluding offenses not punishable by serious imprisonment—is similar to that of the racketeering statute, 18 U.S.C. § 1961(1), discussed *infra* (except that the approach here does not include state law offenses, for reasons discussed *infra*). This definition would include all acts of serious terrorism, but would exclude demonstrators who swing placards at police officers.

<sup>3</sup> In footnotes to each section heading, we shall indicate pertinent comments made by sponsoring Senators when the bill was introduced. Thus:

*Comment by Senator Biden:* "First, I believe the standard that the bill would use as a threshold for investigations of alleged terrorists may be too loose." (Cong. Rec., 7-31-79, 8. 10997.)

*Comment by Senator Bayh:* "In terrorism investigations, 'preparation should be the standard for investigating alleged potential terrorist threats. This concept requires a specific intent to engage in terrorist activity. A similar 'preparation' standard was adopted by the Congress in the Foreign Intelligence Surveillance Act of 1978. . . ." (Cong. Rec., 7-31-79, 8. 10999.)

Second, the words "activity that involves" which now precede the phrase "violent act. . ." in the definition should be eliminated. "Terrorist activity" should be limited to terrorist acts; activity that "involves" terrorism is too vague.

This would make it clear, for example, that the person who merely attends a demonstration, at which someone else commits a terrorist act, is not therefore himself a terrorist. At the same time, it would not unduly hamper FBI investigations, because the FBI could still investigate any and all persons who are reasonably suspected of committing or preparing to commit a terrorist act. It would merely make clear that the target of the investigation must be suspected of terrorist violence, and not merely of engaging in political activities with other persons suspected of terrorism.

## 2. *FBI terrorist investigations should investigate only federal crimes, not state crimes*

The broad definition of "terrorist activity" is of even more concern because "terrorist" investigations under the bill would not be limited to acts which amount to federal crimes. Section 533(b)(3)(B)(ii) would authorize the FBI to investigate groups whose purposes are to be accomplished by a "pattern of terrorist activity" which would violate not federal law, but "the criminal law of a State." This expansion would allow investigations not currently permitted under the Guidelines issued by Attorney General Edward Levi in 1976, would run counter to the Church Committee's recommendation (Report, Book II, p. 319) that the FBI be barred from investigating "local civil disobedience," and would be an unprecedented and undesirable statutory authorization in a subject matter so close to the First Amendment rights of domestic political dissenters.<sup>3</sup>

Furthermore, neither the bill nor the Commentary defines state "criminal law." Thus, FBI "terrorist" investigations could apparently be based on anticipated state law misdemeanors as well as felonies, minor felonies as well as serious ones, and common law as well as statutory crimes.

Even if state "criminal law" were defined to include only serious statutory felonies, there would remain serious objections in any case to expanding domestic federal investigative jurisdiction beyond federal criminal jurisdiction. If the FBI were authorized to investigate state law violations, its jurisdiction would vary from one state to the next, and within a single state over time. With no intervention by Congress, a state legislature could expand or contract the FBI's jurisdiction in its state at will. But once the state passed a law, it would be powerless to stop the FBI from investigating suspected or potential violators. Section 533(b)(3)(B)(ii) thus takes a step down the dangerous road toward converting the FBI into a national police force.

As the Administration's Commentary on §§ 533(b)(2) and (3) notes, one such step has previously been taken—in the federal "Racketeer Influenced and Corrupt Organizations" statute ("RICO"), 18 U.S.C. §§ 1961–68. Section 1961(1) of RICO defines "racketeering activity" to include certain specified state law offenses "punishable by imprisonment for more than one year."

Whatever the wisdom of that more specific and limited provision of RICO, the concept should not be extended in the FBI Charter to allow any state criminal law to serve as the basis for a federal "terrorist" investigation. RICO deals with organized crime. In contrast, FBI "terrorist" investigations under § 533(b)(3), by definition, deal with political groups and thus necessarily implicate the exercise of First Amendment rights. So constitutionally sensitive a subject matter ought to be among the last, not the first, in which the Congress permits federal investigative jurisdiction to be expanded to enforce state law.

In any event, the expansion would be an unnecessary and inefficient allocation of federal resources. Most terrorist acts (except for localized crimes which can be investigated by local authorities) would likely violate the federal criminal code.<sup>4</sup> If any gaps remain which should be filled, Congress should do so by enacting new criminal statutes, not by making the FBI the guardian of state as well as federal criminal law.

The FBI's proper domestic jurisdiction in our federal system has always been, and should remain, to investigate violations of federal law. Section 533(b)(3)(B)(ii) should be deleted in its entirety.

<sup>3</sup> The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801(C), defines international terrorism to include state law violations. However, the FBI's jurisdiction in international matters, unlike its domestic jurisdiction, is not and never has been limited to violations of federal law.

<sup>4</sup> Among relevant federal statutes are the following: kidnapping, 18 U.S.C. § 1201; hijacking, 18 U.S.C. § 1201, 49 U.S.C. §§ 1301, 1471–73, 1487, 1514, 1515; bombing, 18 U.S.C. § 231, 844; firearms for use in civil disorders, 18 U.S.C. § 231; and assassination of a federal officer, 18 U.S.C. § 1114.

**3. Section 533(b)(3) should be amended to incorporate a "preparation" standard for investigating future terrorism**

Section 533(b)(3) would authorize full-scale terrorist investigations of any group whose political purpose "is to be accomplished," even "in part," through future terrorist activity.

The literal breadth of this proposed statutory language—with no requirement of imminence, likelihood or magnitude to the predicted violence—certainly is not, and cannot be, intended. It might permit, for example, a reversal of Attorney General Levi's 1976 decision to close the lengthy and unjustified FBI investigation of the Socialist Workers Party.

The Commentary to § 533(b)(3) apparently recognizes the overbreadth of the bill's language and states, more narrowly than the bill itself, that § 533(b)(3) is not intended to authorize investigations based on "mere abstract advocacy."

The Commentary further indicates that the intent of § 533(b)(3) is to permit investigations in situations which "reasonably indicate a serious intent to engage in terrorist activities," and that the decision to investigate will "take into account . . . the likelihood, immediacy and magnitude" of the intended violence.

This statement in the Commentary of the bill's intent does not satisfactorily resolve the problems created by the bill's overbroad language. The Commentary indicates only that this intent will be adopted in "guidelines or internal procedures," and then only "to the extent possible."

In effect, the Commentary thus proposes that Congress enact an overbroad statutory provision, but indicate in the legislative history that the provision means less than what it says, and then leave it to the Justice Department and the FBI to determine how much less—all in an area touching closely on First Amendment freedoms.

This approach would not be prudent. The standard for terrorist investigations—one of the most fundamental and important components of an FBI Charter—should be written into § 533(b)(3), not left to unspecified administrative measures. Internal agency guidelines or procedures would be subject to change by the Department or the FBI at any time, might be kept secret (under § 537b), and might well not be externally enforceable, via whatever civil remedies Congress chooses to provide for serious charter violations.

Moreover, while the "serious intent" standard hinted at in the Commentary is well-intended, it is not objective enough, even if it were incorporated in the bill. Although the Commentary considers and rejects it, a better standard is Senator Bayh's proposed "preparation" standard for investigations of "future" terrorism. As Senator Bayh has noted, (Cong. Rec., 7-31-79, S. 10999), a similar preparation standard was adopted for surveillance of international terrorists in the Foreign Intelligence Surveillance Act of 1978. (50 U.S.C. § 1801(b)(2)(c).) If such a standard was deemed appropriate by the Congress to protect the rights of international terrorists, then surely domestic political groups—who have violated no laws and who are investigated only because the FBI suspects that they might engage in future "terrorism"—are entitled to no less protective a standard.

The Commentary to § 533(b)(3) argues against such a "preparation" standard because (1) it would "[delay] the investigation to a point that is dangerously close to the commission of the crime," and (2) "it is not clear how the government would acquire [evidence of preparation] without prior investigation. . ."

After careful consideration of each of these important arguments, we do not find either to be persuasive. The considerable advance investigative leeway allowed under a "preparation" standard is clear from the legislative history of the Foreign Intelligence Surveillance Act of 1978. The Senate Intelligence Committee Report explains that "preparation" would include, "for example, purchase or surreptitious importation . . . of explosives, planning for assassinations, or financing of or training for such activities." Further, "the term 'preparation' does not require evidence of preparation for one specific terrorist act . . ." but could include "for example, providing the personnel, training, funding or other means for the commission of acts of terrorism, rather than one particular bombing."<sup>1</sup>

If the FBI has no evidence that a political organization is engaged in even such advance preparations for terrorism in general (not necessarily for specific acts of terrorism), then we believe the members' First Amendment interest in freedom from government surveillance of their lawful political activities should outweigh the law enforcement interest in investigating possible future "terrorism."

<sup>1</sup> Report at 26, 1978 U.S. Code Cong. & Adm. News at 5745; accord, House Conference Report at 20, 1978 U.S. Code Cong. & Adm. News at 5799. (The Senate Judiciary Committee Report (p. 24) called for an even stricter standard.)

Not only is a "preparation" standard adequate, but a vaguer "serious intent" standard would have little, if any, additional investigative value. The Commentary to § 533(b)(3) cites only two factors short of preparation as demanding investigation. However, neither would justify an investigation, unless it were coupled with some evidence of preparation.

The first factor, a "prior record of violence," obviously could not, by itself, justify an investigation. The second, an "announced intent to engage in violence," could justify, by itself, a preliminary inquiry if it were specific and immediate (although not if it were mere abstract rhetoric). In that inquiry, a prior record of violence could be considered. If the inquiry detected evidence of preparation, it could be expanded to become a full investigation.

The Commentary contends that preliminary inquiries in "current practice" are too "limited" to likely produce evidence of preparation. However, under the bill and commentary as introduced, preliminary inquiries could utilize, at least in "compelling" circumstances, all but five investigative techniques. (Commentary to § 533.) Three of these techniques (wiretaps, mail openings, and mail covers) could not be used even in a full investigation without evidence of "preparation";<sup>6</sup> the fourth (investigative demand) cannot now be used at all, even in a full investigation; and the fifth (infiltration of groups by new sources) should not, and possibly could not, be used at all under the bill absent evidence of "preparation."<sup>7</sup> Thus, when the FBI has no evidence of "preparation," permitting only preliminary inquiries and not full investigations would deprive the Bureau of few, if any, investigative techniques.

We understand that during Senate Judiciary Committee hearings on S. 1612 in September, government witnesses acknowledged that greater restrictions may be necessary on the techniques authorized to be used in preliminary inquiries. If such further restrictions are imposed (and we believe they are generally desirable), preliminary inquiries of possible terrorist activity could be exempted from them, in order to ensure the availability of techniques necessary to detect evidence of preparation for terrorism.

While we are hesitant to suggest such a relaxation of proposed restrictions on preliminary inquiries, we believe this approach is preferable to the alternative of permitting full investigations of future terrorism based on evidence not meeting a "preparation" standard.

The only other major limitation on preliminary inquiries "contemplated" by the Commentary to § 533(a) are their "short duration" (presently, under the 1976 Attorney General Guidelines, up to 6 months with FBI Headquarters approval), and their focus on "whether a full investigation is warranted"—i.e., for present purposes, whether there is evidence of "preparation" for terrorism. Thus, under a "preparation" standard the FBI would still have up to six months to use all or nearly all the investigative techniques legally available even in a full investigation to detect evidence of preparation for terrorism.

A "preparation standard" would therefore allow adequate advance investigative authority in terrorism cases. Considering the First Amendment interests at stake, this comparatively precise and objective standard is preferable to a vague and subjective "serious intent" standard. Therefore § 533(b)(3) should be amended to permit full investigations of potential "future" terrorists only when the FBI reasonably suspects that the subjects are knowingly engaged in preparation for terrorism.<sup>8</sup>

<sup>6</sup> "Probable cause," a stricter standard than mere "preparation," is required for domestic wiretaps (18 U.S.C. § 2518(3)) and for mail opening (see Commentary to § 533b(d) of S. 1612); domestic mail covers require "reasonable grounds . . . which demonstrate the mail cover is necessary to . . . (c) obtain information regarding the commission or attempted commission of a crime." (Postal Regulation 861.4, 39 C.F.R. 233.2, as recently amended, see *Paton v. LaPrade*, 469 F. Supp. 773 (D.N.J. 1978), 44 Fed. Reg. 24111, April 24, 1979.)

<sup>7</sup> Section 533b(b)(6) of the bill would permit infiltration of a "terrorist" group only if a senior FBI official finds that it is "necessary." The Commentary to this section, citing First Amendment considerations, states that this means a "higher standard" than generally required to employ informers. (See also BPI's separate comments on the infiltration provisions of the bill.)

<sup>8</sup> The words "knowingly engaged" are meant to preclude full terrorist investigations of the political associates of terrorists who are unaware of the intended terrorism. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961).

## II. INVESTIGATIONS OF FUTURE "GENERAL CRIMES" WHICH ARE NOT IMMINENT\*

Section 533(b)(1) would authorize full investigations of persons who "will engage" in federal crimes. Nothing in the bill specifically requires that the future crime be imminent.

The Commentary to § 533(b)(1) suggests only that "a greater likelihood" of crime (than required to investigate past or present crimes) would be needed to investigate future crimes.<sup>10</sup> (How much greater likelihood is not stated.)

This absence of any mention of imminence cannot be intended, given the Commentary's recognition that even "terrorist" investigations under § 533(b)(3)—the most compelling case for investigating future crimes—the First Amendment demands care in deciding "how far in advance of crime" the investigation may begin. (Commentary to § 533(b)(3).) In investigations under § 533(b)(1) of future "general crimes" by political activists or groups, the First Amendment should all the more require that the future crimes be imminent.

Many "general crimes" could involve political activists and groups. Indeed, some violations of the four main statutes on which the FBI has traditionally based its "domestic security" investigations would be non-terrorist, and thus could apparently be investigated only as "general crimes."<sup>11</sup> If it is intended that all violations of these four statutes be investigated only as "terrorist activity"—and any such intent should be made plain—there would nonetheless remain many other non-terrorist crimes involving political groups and activists which could be investigated only as "general crimes." Examples include selective service violations or treasonous acts (such as Vietnam War protesters were accused of) or Atomic Energy Act violations (which anti-nuclear protesters might some day be suspected of). Civil rights and anti-riot laws might also justify non-terrorist investigations of political groups. Even investigations of normally apolitical crimes, such as interstate car theft or fraudulent use of a credit card, would implicate First Amendment rights if the potential criminals are members of a political group and may intend to use the goods for political ends.

Because investigations of future "general crimes" can thus be targeted at controversial political activists and groups, it is important that they not be permitted to continue for years, looking for a crime which "will" occur, if ever, only in the indefinite future. To prevent such perpetual investigations of political groups, no crime should be investigated as a future crime under § 533(b)(1) unless it is imminent. This would be accomplished by Senator Bayh's suggested (Cong. Rec., 7-31-79, S. 10998) standard which would permit investigation if the crime is "about to" occur.

One possible objection to this standard—that it would delay investigation until too late—is not valid. Under an "about to" standard for full investigations of future crimes, the FBI could still spend up to six months (under current practice) in a wide-ranging preliminary inquiry seeking evidence that a crime is "about to" occur. (See pp. 12-13, *supra*.)

\* Comment by Senator Biden: "... [T]he Church Committee insisted that there be reason to believe that the subject of the investigation will soon engage in illegal terrorist activity. The purpose of this restriction is to keep the FBI out of the investigations of illegal 'subversives'... Without the 'soon' restriction the FBI could investigate a subject out of fear that he might engage in... overthrow of the Government some time in the indefinite future." (Cong. Rec., 7-31-79, S. 10998.)

Comment by Senator Bayh: "In full field investigation of general crime, I would propose that the standard for a future crime would be 'about to' be committed, rather than 'will be' committed in order to trigger an investigation. The word 'will' is vague and open-ended. The term 'about to' conveys the idea of 'clear and present danger'..." (Cong. Rec., 7-31-79, S. 10999.)

<sup>10</sup> The Commentary to § 533(b)(1) also states that "mere hunch is insufficient" to investigate future crimes. Since "mere hunch" is never a permissible basis for investigating, this should be stricken. Under § 533(b)(1), only "facts or circumstances that reasonably indicate" crime could justify an investigation. Even preliminary inquiries, according to the Commentary on § 533(a), are intended only to allow inquiries based on "ambiguous or incomplete information."

<sup>11</sup> However, almost all the potential non-terrorist violations of these four statutes are either dubious or rare. Thus Congress could well require that any investigations under these statutes be conducted only under § 533(b)(3). To elaborate:

(1) Non-terrorist investigations under the Internal Security Act of 1950, 50 U.S.C. §§ 781 *et seq.*, could be conducted under §§ 783(a) (conspiracies to contribute to the establishment of a dictatorship), 783(c) (attempts to obtain classified information), 784 (communists holding or seeking certain government or union employment) and 789 (communists using the mails or broadcast media, or instrumentalities of commerce for solicitation, without certain disclosures). Most of these provisions are of dubious constitutionality under the First Amendment. *United States v. Robel*, 389 U.S. 258 (1967). Moreover, they might fall entirely outside the bill, since the FBI currently treats its Communist Party USA investigation as a foreign intelligence and counter-intelligence matter, which would be excluded from coverage by § 531(a) of the bill.

(2) Only relatively unusual violations of the other three main "domestic security" statutes—18 U.S.C. §§ 2383, rebellion or insurrection, 2384, seditious conspiracy, and 2385, advocating overthrow of the government—would fall outside the "terrorism" provisions of § 533(b)(3). For example, singlehanded incitement violating § 2383 or advocacy violating § 2385 would fall outside § 533(b)(3) of the bill, because it applies only to terrorist "enterprises" of two or more persons. Similarly, a seditious conspiracy in violation of § 2384 could plan to use force in a manner—e.g., breaking into a military facility to pour blood on defense records—which would not be "terrorist activity" as defined in § 531(b)(14) of the bill.

In addition, the ability to investigate inchoate crimes—primarily conspiracies—would give the FBI an additional “head start” on detecting crimes “about to” occur.<sup>12</sup> The FBI would not have to defer its full investigation of draft-card burning until the match is “about to” be lit; it could begin investigating at the much earlier point when a conspiracy to burn draft cards is “about to” occur.

Indeed, when an “about to” standard is applied to conspiracy or other inchoate offenses, it threatens to allow too much advance investigative latitude, and might insufficiently protect First Amendment freedoms. It might permit perfectly lawful political statements or associations to trigger an investigation, on the theory that a revolutionary conspiracy may be “about to” occur, even though the conspirators (once they agree) will contemplate revolution only in the distant, indefinite future.<sup>13</sup>

What appears to make an “about to” standard acceptable as applied to future conspiracies under the bill is the separate provision in § 531a(d), barring FBI investigations based “solely” on a “political view lawfully expressed” or on the exercise of other First Amendment rights, such as the right to associate for political purposes. As we understand this section, the FBI could not under § 533(b)(1) investigate a conspiracy which is “about to” occur, unless the FBI has reasonable suspicion, based on evidence other than constitutionally protected speech or associations, that a criminal conspiracy is “about to” occur. Thus, group advocacy of revolution could not justify investigation of a possible future criminal conspiracy unless the advocacy amounts to unprotected incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).<sup>14</sup>

In short, the FBI does not need to investigate future “general crimes” unless they are imminent, and in many circumstances the First Amendment would not countenance such statutory authority. Section 533(b)(1) should be amended to permit investigations of future crimes only when they are “about to” occur. The Congressional Committee Reports should further reflect concern that an “about to” standard, when applied to future conspiracy or other inchoate offenses, could be subject to abuse and that investigations of future conspiracies must therefore comply strictly with § 531a(d).

### III. THE SCOPE OF INVESTIGATIONS OF POLITICAL GROUPS AND ACTIVISTS

The bill would authorize the FBI to investigate political groups and activists suspected either of “general crimes” under § 533(b)(1) or of “terrorist activity” under § 533(b)(3).<sup>15</sup> The permissible scope of these investigations is an issue of critical importance. As the Church Committee warned (Report, Book II, p. 319), “Investigations of terrorism . . . which are not limited in time and scope could lead to the same abuses found in intelligence investigations of subversion or local civil disobedience.”

<sup>12</sup> Conspiracies are outlawed by many federal statutes, including a general conspiracy statute, and attempts are outlawed by a number of statutes relevant to potential investigations of political groups. While some conspiracies or attempts would ordinarily involve “terrorist activity,” many others could involve non-terrorist offenses and would be investigated as “general crimes” under § 533(b)(1). Examples include:

Conspiracy: In addition to the general conspiracy statute, 18 U.S.C. § 371 (to commit any offense against the United States), others are 18 U.S.C. §§ 372 (to impede a federal officer), 241 (to oppress or intimidate a citizen in exercising or enjoying any federal right or privilege), 793 (to gather defense information); 40 U.S.C. § 193h (to commit unlawful acts at the Capitol); 42 U.S.C. §§ 1973 (to deny voting rights), 2272-75, 2277 (to commit Atomic Energy Act violations).

Attempts: 18 U.S.C. § 752 (to assist in the escape of a prisoner); 40 U.S.C. § 193h (to commit unlawful acts at the Capitol); 42 U.S.C. §§ 1973 (to deny voting rights), 2272-75 (to commit Atomic Energy Act violations).

However, solicitation (a third type of inchoate offense) is made unlawful by only a few federal statutes and would rarely be the basis for investigating a political group. (18 U.S.C. § 2 makes it punishable to counsel, command, induce or procure a crime, but only if the crime is in fact committed. *United States v. Dennis*, 183 F.2d 201, 207 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951). Hence a violation of 18 U.S.C. § 2, unlike a criminal conspiracy, is not “about to” occur until the solicited crime is itself “about to” occur.)

<sup>13</sup> The Supreme Court has warned of the dangerous breadth of criminal conspiracy laws, even in cases not involving First Amendment rights. In *Krulwich v. United States*, 336 U.S. 440, 445-46 (1949) (concurring opinion), Mr. Justice Jackson, terming conspiracy an “elastic, sprawling and pervasive offense,” warned that “loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.” In *Grunewald v. United States*, 353 U.S. 391, 404 (1957), the Court cited his *Krulwich* opinion, and repeated earlier admonitions that “we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.”

So, too, Congress must view with disfavor attempts to use conspiracy laws to broaden the FBI’s already wide-sweeping net in investigations of political activists for “future” crimes.

<sup>14</sup> *Brandenburg* holds that the First Amendment protects “advocacy of the use of force or of law violation except where such advocacy is [1] directed to inciting or producing imminent lawless conduct and [2] is likely to incite or produce such action.” 395 U.S. at 447. The Supreme Court’s earlier formulation in *Noto v. United States*, 367 U.S. 290, 298 (1961), was less precise.

<sup>15</sup> Other investigations raising similar First Amendment concerns could include preliminary inquiries under § 533(a), certain political corruption investigations under § 533(b)(2), investigations of civil disorders under § 535a, FBI assistance to local police under § 535d(f), and FBI assistance to foreign security agencies (e.g., the former Iranian SAVAK) under § 536a(4)-(6).

Several clarifications of the Commentary or clarifying amendments to the bill are needed to define the scope of FBI investigations of political groups and activists. At present, the bill contains only general principles and criteria for guidelines relating to the scope of investigations. Investigations shall "focus on criminal activity" (§ 531a(c) and § 533a(a)(1)) and shall be conducted with "minimal intrusion" consistent with timely and effective investigation (§ 531a(b) and § 533b(a)(1)), and their "scope and intensity" shall depend on the "nature and quality" of the information on which they are based (§ 533a(a)(3)).

These principles and criteria do not explicitly state that the scope of an investigation should depend in part on its impact on First Amendment rights. Thus, an investigation of a political group, which could directly threaten core First Amendment interests, would not have to be any more limited in scope or intrusiveness than an investigation of organized crime, which would have little (if any) impact on First Amendment rights.

The bill should explicitly mandate what it presumably intends: the FBI must conduct investigations so as to minimize their possible impact on First Amendment rights (and not merely their "intrusiveness"), and must take First Amendment impact into account as a factor affecting the scope of investigations. Concomitantly, it should be explicitly recognized in the Commentary that investigations of political groups should generally be more limited in scope than, say, organized crime investigations.

In addition, the Commentary should give much more detailed guidance, including examples, to clarify the congressional intent as to the scope of investigations of political groups and activists. For example, in an investigation of a suspected crime by a leader of a political group, the FBI should be permitted to report on the identities of other members of the group or their political statements, affiliations, literature, or lawful First Amendment activities such as demonstrations, only if this information would reasonably tend to demonstrate or negate the guilt of the "suspect." (In contrast, the FBI could properly record the names and non-political statements of the business associates of a suspected racketeer if this information were of some potential investigative value, albeit slight, because obtaining this information in a non-political case would not implicate First Amendment rights.)<sup>16</sup>

In one area involving First Amendment rights—investigations under § 533(b)(3) of terrorist "enterprises"—the bill would expand, rather than narrow, the permissible scope of investigations. The Commentary to § 533(b)(3) proposes that these investigations be "broader and less discriminate than usual," exploring the "size and composition of the group," the "relationship of the group members," and the group's "intended criminal goals." In other words, the focus of a terrorist investigation would be on affiliations with and the goals of a political group which might—or might not—prove to be terrorist. In fact, regardless of its criminal purpose, the investigation will collect largely political information.

Based on our review of thousands of pages of FBI files, one can explain the scope of terrorist investigations, as proposed by the Commentary to § 533(b)(3), as follows:

1. Determining the "composition" of the terrorist group and the "relationships" of all its members means, in practice, inquiring into the political beliefs and affiliations, not only of every member of a political party espousing revolutionary goals, but also of anyone who has anything to do with the party, in order to determine whether they share a "common purpose." Thus, anyone whose phone number is listed on the toll call records of the group or its leaders, anyone mentioned in the group's newspaper, or who subscribes to its newspaper, or who attends one of its political meetings or a political demonstration it sponsors, would become fair game for FBI inquiry into their politics.

Under FBI policy in effect since August 30, 1976,<sup>17</sup> the FBI will not conduct what it calls an "investigation" of such persons if they do not occupy a "policy-making position" in the group and are not likely to use violence. Nonetheless, the FBI gathers and files information about their political activities as part of its investigation of the group. While this reduces the FBI's statistics on the number of domestic security investigations, and may mean that less personal background information is obtained about the "non-investigated" person, the FBI still records and retains information about the person's lawful political affiliations and activities.

<sup>16</sup> See generally, R. Raggl, "An Independent Right To Freedom of Association," 12 Harv. Civ. Rts. L. Rev. 1 (1977).

<sup>17</sup> See General Accounting Office Report GGD-78-10, Nov. 9, 1977, "FBI Domestic Intelligence Operations: An Uncertain Future," Appendix VI.

The resulting statistical improvement works as follows. Suppose an FBI informer attends a political meeting of 30 persons. Under FBI practice until 1976, 32 copies of his report would have been made and filed: one for the informer's file, one for the group's file, and one for a file on each person at the meeting. Under current practice, his report will still identify all persons present and summarize everything said, but only four copies might be filed; one in the file on the group, one in the informer's file, and one each in the files of the two policy-making leaders of the group. The number of FBI domestic security investigations is thus cut impressively, from 31 down to 3, but the FBI still collects the same political information, and the information on a "non-investigated" person is still retrievable from the file on the investigated group.

2. Determining the "intended criminal goals" of the group means, in practice, investigating all of its goals, including all its political goals. In turn, this means, in practice, investigating and reporting on all its political meetings, all its political literature, indeed everything it does.

The sum of (1) and (2)—both in current FBI practice and as proposed in the Commentary to § 533(b)(3)—is a complete political investigation, despite its criminal investigative purpose to detect evidence of possible future terrorism.

One recently added amendment to the Commentary helps narrow this political scope of terrorist investigations, but not enough. The Commentary to § 533(b)(3) now states that

"the investigation must be confined to members of the criminal enterprise, particularly when such enterprise is a subgroup of a larger organization that engages in lawful political activities."

This limitation is useful and important where there are clearly defined violent subgroups of larger political groups, e.g., the violent Weathermen faction of the larger Students For A Democratic Society (SDS). In such a case, if the FBI obtains information reasonably indicating that the Weathermen subgroup, as a group, is uniformly engaged in terrorism, the FBI could properly investigate each member of the Weathermen, even without further evidence of terrorist activity by each individual. But the FBI could not—absent independent evidence of terrorist activity—investigate other members of SDS.

However, this "subgroup" qualification falls short of accomplishing its purpose, in two respects. First, it might be interpreted to limit only "investigations," and not the gathering of information about a person's First Amendment activity. Thus, if 5 Weathermen attend a demonstration of 100 SDS members, the FBI informer's report might attempt to identify everyone present, and might report on all their political statements and activities. The report would then be placed in an FBI file labeled "Weathermen" rather than "SDS", but the file would still contain retrievable information about the lawful political activities of non-Weathermen SDS members.

To avoid any such misreading which could eviscerate the provision, the Commentary should specify the congressional intent to prohibit, not merely "investigations," but the collection and retention of information about the First Amendment activities of persons not under investigation, unless such information would bear on the guilt or innocence of the persons who are under investigation. Furthermore, in the event such information about a person not under investigation is collected, it should not be indexed or otherwise be made retrievable by the person's name.

The second shortcoming in the language of the "subgroup" limitation is equally important. Its purpose is to permit investigation only of those members of a political group who are reasonably suspected of terrorism. In many cases, however, this subgroup is not self-defined and separately labelled; it exists only in fact. Indeed, it may not even be a de facto, cohesive subgroup; it may be only a number of violence-prone individuals, separate and scattered, in an otherwise peaceful political group.

In such a situation, the terrorist individuals or defacto subgroup should be investigated, whereas the larger political group and its majority of peaceful members should not be investigated. However, lacking a self-defined and labelled subgroup, the FBI might well open a "terrorist" investigation of the group despite the "subgroup" limitation now in the Commentary.

The Commentary should therefore clarify the subgroup limitation to prohibit "terrorist" investigations of groups unless there is reasonable suspicion that the group, as a group, is terrorist, and not merely that certain of its members or leaders may be suspected of terrorism.<sup>18</sup> In this situation, as in the case of the

<sup>18</sup> There should be evidence which is sufficiently strong and pervasive to justify an imputation of terrorism to the group "as a whole." *Noto v. United States*, 367 U.S. 290, 298 (1961).

defined subgroup, the FBI should not be permitted to collect or retain information about the identities of First Amendment activities of non-suspect members or associates of the political group, unless such information would tend to demonstrate or negate the guilt of the suspects. Again, if First Amendment information about non-suspects is obtained, it should not be indexed by their names.

These clarifications would make the "subgroup" proviso—which should be explicitly made applicable to any investigation of political groups—more likely to accomplish its purpose. However, they still do not adequately narrow this very broad political scope of "terrorist" investigations as proposed by the Commentary to § 533(b)(3). Terrorist investigations of political groups, which necessarily implicate First Amendment rights, should focus—at least as much as general criminal investigations—on criminal conduct. Hence the proposed broader scope for terrorist investigations should be eliminated. The standard for initiating terrorist investigations is already weaker than for initiating "general crime" investigations. In this First Amendment context, there has been no demonstration that the FBI needs more, i. e., that it must also be permitted a broader scope in its terrorism investigations.

It is essential that Congress carefully defines the scope of FBI criminal investigations of political groups and activists. The Charter's success in focusing the FBI on criminal conduct will depend, in large part, on the permissible scope of investigations of political groups.

If that scope is not clearly defined, the resultant message to anyone curious about or mildly interested in a controversial political group will be simple: stay away. The price of the merest inquiry—or any contact at all with the group—might well be to have one's politics written up in an FBI file. To illustrate: How many congressional staff members would dare attend a meeting of socialists, knowing that the FBI might report on every person there as part of an investigation of one of them for possible future "terrorist activity"?

Clarity is required so that persons exercising First Amendment rights will not "steer far wider of the [investigated] zone," . . . than if the boundaries of the [investigated] areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1959) (both cases involving domestic security).

#### INFILTRATION OF POLITICAL GROUPS<sup>19</sup>

We will address only one of the many contexts in which the bill would govern the use of informants by the FBI: infiltration of political groups. It is here that FBI informers have made the most repeatedly serious inroads upon First Amendment freedoms. (See generally e. g., Church Committee Report, Book II, pp. 13, 74-76, Book III, pp. 225-70).

The bill would regulate infiltration of political groups by two different sets of standards and procedures: one set for infiltration to investigate "general crimes," and a second, more stringent but still vague and inadequate set, for infiltration to investigate "terrorist activity." In general, we recommend that the same standards and procedures govern all FBI infiltration of political groups, and that they be more clearly defined and limited.

##### 1. The bill's stricter standards and procedures for infiltration of terrorist groups should be applied to all infiltration of political groups

The only provision in the bill which would appear to restrict infiltration of political groups in "general crimes" investigations is § 533b(b)(1). It would permit use of an informer, upon a written finding by a "supervisory" FBI official that the informer appears suitable for use and that the information likely to be obtained is "pertinent to and within the scope of" FBI investigative jurisdiction. The finding must be made in accordance with administrative guidelines and reviewed periodically by the Director or his designee.

Under this permissive standard, a suitable informer could be assigned to infiltrate a political group in any FBI "general crimes" investigation (subject only to administrative guidelines which, as discussed below, add little).

<sup>19</sup> Comment by Senator Bayh: "Infiltration of groups is one of the most intrusive investigative techniques and must be controlled by responsible officials who are sensitive to minimization principles. . . . The principles controlling the use of this technique must be in the language of the charter itself."

"Those principles include a finding of necessity and minimization procedure for infiltration of any group that is under investigation. The charter should also clarify the safeguards with respect to infiltration of groups to investigate individual members." (Cong. Rec., 7-31-79, S. 10999.)

Strangely, the bill provides a stricter standard for infiltration of suspected terrorist groups. Section 533b(b)(6) provides that before infiltrating a suspected terrorist group, a "senior" official (not merely a "supervisory" official) must find in writing that the infiltration is "necessary" (not merely "pertinent"). In addition, the finding must contain a statement of means reasonably designed to minimize reporting of information that does not relate to matters within FBI jurisdiction.

For reasons discussed later, we believe this standard should be more clearly defined, and that its administration should not be left entirely to the FBI. However, even without clarification, it is stronger than the standard for infiltrations of political groups in "general crimes" investigations, and we perceive no good reason for this discrepancy. Whatever the infiltration standard for terrorist groups should be, there should be no lesser standard for infiltration of other political groups.

The Commentary to § 533b(b)(6) explains the stricter standard for terrorist groups on the ground that "infiltration of groups whose motivation may be political raises unique First Amendment considerations." Indeed it does. But this rationale applies equally to all infiltration of political groups.

If the disparate standard is merely inadvertent, it should be corrected. If the bill intends that political groups cannot be infiltrated unless they are suspected of terrorist activity, this should be made plain.

Another possible, but inadequate, explanation which has been advanced for the different standards is a concern that, if strict standards were set for infiltration of political groups in "general crimes" investigations, the same standard would have to be extended to all "general crimes" infiltrations, even of non-political crime syndicates, on the theory that all such groups necessarily engage in First Amendment "freedom of association."

This theory is legally unsound. Association for purely non-political, criminal or commercial purposes, is, at best, on the periphery of the First Amendment "freedom of association."<sup>20</sup> It therefore need not command the same statutory safeguards which must govern infiltration of political groups.

The § 533b(b)(6) standard and procedures for infiltration of suspected terrorist groups should therefore be extended to all infiltrations of political groups. Of course, "political" groups must be defined for this purpose. One possible definition appears in the accompanying footnote.<sup>21</sup>

## 2. The standard for infiltration of political groups

The § 533b(b)(6) standard for infiltration of suspected terrorist groups—that it be "necessary"—should also be clarified. It is not now defined, either in the bill or in the Commentary. "Necessary" may have various meanings in American law, ranging from merely "appropriate" to "indispensable." Presumably the "necessity" required for infiltration means something more than appropriate,<sup>22</sup> but whatever it means should be made clear in the bill.

<sup>20</sup> As one commentator has recently observed, the Supreme Court "has never been committed to the protection of freedom of association as an independent and unique right. In fact, 'freedom of association' has been little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." R. Raggi, "An Independent Right to Freedom of Association," 12 HARV. CIV. RTS. L. REV. 1, at 1 (1977).

<sup>21</sup> For purposes of the stricter standard and procedure for infiltration of "political" groups under § 533b(b)(6) [which currently applies only to infiltration of suspected "terrorist" groups], "political" groups can be defined as follows:

A "political group" is an enterprise (as defined in § 531h(5) of the bill)—

(1) which reasonably appears to conduct its activities in whole or substantial part for the purpose of influencing, protesting, or influencing the views of the civil population concerning, the policies or actions of the Government of the United States or of any State or political subdivision thereof or of any foreign state, or the trade or economic policies or actions of a corporation or other entity engaged in commerce; or

(2) which is, or one of whose members is, reasonably suspected of a crime, which reasonably appears to be committed or about to be committed for one of the purposes described in (1); or

(3) which reasonably appears to engage in activity for one of the purposes described in (1), information about which is likely to be acquired during the course of the investigation.

[The core of this proposed definition, the political "purpose", is derived from the bill's current language in § 533(b)(3)(A) defining the "purposes" of terrorist groups, except that here the elements of intimidation or coercion, violence, and foreign commerce, which pertain particularly to terrorism, are omitted.]

<sup>22</sup> The Commentary to § 533a states that the Attorney General guidelines are expected to condition more intrusive investigative techniques (such as infiltration) on a stronger factual basis than is necessary to open an investigation.

Infiltration under § 533b(b)(6) must also comply with applicable attorney general guidelines. However, existing guidelines—which do not specifically address infiltration of political groups, but only the use of informers generally—shed little light on the infiltration standard.<sup>23</sup>

In any event, the standard for infiltration of political groups—one of the most important elements of the charter—should be written into the bill, not left to administrative guidelines. If the standard of “necessity” were clearly defined with due regard for sensitive constitutional values, it would do.

Accordingly, we propose the following definition of the “necessity” which is required to permit infiltration under § 533b(b)(6). (Of course, this standard could be adopted, and we believe it should be, regardless of whether it is labelled “necessity.”) Our definition is:

“Infiltration of a political group is ‘necessary’ when: (1) there exists probable cause to believe that the group, or one or more of its members acting on behalf of the group, has committed, is committing or is about to commit a federal felony; (2) the infiltration is reasonably likely to obtain important evidence directly relevant to the investigation; (3) all reasonable alternative means of obtaining the information in a timely fashion have been exhausted or would be obviously futile; and (4) the likely law enforcement value of the infiltration outweighs the likely harm to First Amendment interests.”

This four-pronged definition of “necessity” would fairly protect political groups’ First Amendment interests in freedom from government infiltration. It is comparable to the tests employed by the Supreme Court, in a variety of contexts, to determine whether an infringement of First Amendment rights is justified in the interest of law enforcement. See, for example, the four-part test in *United States v. O’Brien*, 391 U.S. 367 (1968).<sup>24</sup>

In essence, under this definition, infiltration of political groups is “necessary” and hence permissible whenever it is important to the investigation of a federal felony, except where the foreseeable adverse impact on freedom of speech and association is even more important.

Given the direct and often substantial impairment of First Amendment rights which is inherent in government infiltration of political groups (as discussed *infra*), there should be no strenuous objection to most of this proposed definition. Few thoughtful persons would seriously argue that the FBI should be permitted to infiltrate political groups to investigate minor offenses (the first factor), or to obtain unimportant or irrelevant information (the second factor), or when the evidence can be obtained by other, less constitutionally sensitive means (the third factor).

Thus, the only controversial parts of this proposed definition should be the “probable cause” standard, and the requirement that the law enforcement value of the infiltration exceed its detriment to First Amendment values (the fourth factor). However, this last factor, unlike the others, is not a relatively objective or constraining limitation, but merely alerts the decisionmaker consciously to balance the significant interests at stake. Only on rare occasions would a proposed infiltration meeting the first three criteria be rejected for failure to meet the fourth.

<sup>23</sup> The present guidelines erect no standard at all, but merely direct the FBI to “weigh” five factors in deciding whether to use informers. At least three of these factors fail to take adequate account of the First Amendment.

The first factor includes the risk that the informer may, “contrary to instructions,” violate individual rights, or “unlawfully” inhibit free speech or association. This is grossly underinclusive. As explained *infra*, much of the First Amendment toll exacted by infiltrators in political groups is not due to their maverick misconduct, but inheres in the very use of the technique. This inherent constitutional cost (not even mentioned in the guidelines) counsels heavily against infiltration of political groups except in the most compelling circumstances.

The second factor includes the seriousness of the case and the likelihood that the information is not “readily available” through other sources. When applied to infiltration of political groups, this should be more specific. Such infiltration should be authorized only to detect the most serious offenses, after all reasonable alternative means of obtaining the information in a timely fashion have been exhausted or would be obviously futile.

(The third and fourth factors are the character of the informer, and the FBI’s ability to control him.) The fifth factor is the potential value of the informer’s information in relation to what he asks in return. When applied to infiltration of political groups, this, too, should be more specific. Such infiltration should be permitted only to obtain important evidence directly relevant to the investigation.

<sup>24</sup> In *O’Brien*, a draft card burning case, the Supreme Court specifically addressed the genre to which political groups suspected of crimes belong: cases in which “speech” and “non-speech” elements are combined in the same course of conduct.” 391 U.S. at 376. In such cases, a “sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.” *Id.* Noting that the requisite interest has been characterized by a variety of “descriptive terms”—here the term is “necessary”—the Court articulated the general standard as a four-part test. The government action is sufficiently justified: “[1] if it is within the Constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377.

The four-part test we propose in the text adapts the *O’Brien* standard to the specific case of FBI infiltration of political groups. Although our formulation necessarily differs somewhat in its language, we believe a multiple-factor test along the lines we suggest is constitutionally desirable, and arguably required, in light of *O’Brien*.

But it is necessary because this could sometimes happen: for example, where a felony, which could probably be proved only by infiltration, is not terribly serious in the circumstances and infiltration would cause identifiable, foreseeable and serious interference with non-governmental political activity.

Once this much is understood, the only remaining controversial component of our proposed definition of "necessary" should be the "probable cause" standard for infiltrated political groups. The bill and the Commentary implicitly reject such a standard, presumably on the ground that in some cases probable cause could not be demonstrated without prior infiltration, and that a probable cause standard would therefore shield some serious crimes from detection or prevention.

This objection must be taken seriously. It is undeniably true that at least some—one may debate how many—serious crimes will escape detection if infiltration of political groups is permitted only under a probable cause standard.

However, the same is true of other investigative techniques whose use our society has nonetheless conditioned on a prior showing of probable cause, both traditionally (physical searches of private property), and in recent years (criminal wiretaps, 1967; domestic security wiretaps, 1972; and foreign counterintelligence wiretaps, 1978). At least some serious crimes undoubtedly go undetected because these surveillance techniques are permitted only under a probable cause standard.

Nonetheless, because of our historic commitment to Fourth Amendment values, and our awareness of the threat to these values posed by government searches of private property and wiretaps, our country in adopting the Constitution, our courts in recent wiretap decisions, and our Congress in recent wiretap legislation, have all determined that the gain in privacy from a probable cause standard is worth the loss to law enforcement.

The same balancing of interests, we suggest, compels a probable cause standard for infiltration of political groups. Infiltrators are at least as intrusive as property searches or wiretaps. They commonly enter the homes of their political "friends"; indeed, they are sometimes entrusted with extra sets of keys, or even left to house-sit while their "friends" are away from home. They commonly overhear or take part not only in telephone conversations, but in other conversations more intimate than those normally held over the telephone. FBI infiltrators have become "best friends" with members of infiltrated groups, and have been romantically and sexually involved with the very persons who later learned of their betrayal.

Moreover, the intrusiveness of infiltrators is uniquely pervasive: there is no personal or political intimacy one can express, no place one can go to express it, and virtually no political associate to whom one can tell it, and be certain that an infiltrator will not pass it along to the FBI.

Infiltrators thus pose at least as great a threat to personal and associational privacy as other surveillance techniques whose use is already conditioned on a showing of probable cause.

Infiltrators in political groups also pose clearer, more direct and serious threats to First Amendment interests than do property searches or wiretaps. Uniquely among surveillance techniques, infiltrators do not merely report on First Amendment conduct, they participate in it. An informer at a steering committee meeting does not merely observe the vote; he votes. He or she may be called on to voice an opinion, which may influence the votes of others on a proposed political course of action. Or the infiltrator may be asked to help sell the group's newspaper, or to explain the group's beliefs to outsiders, to speak at a rally, or to raise funds or to recruit new members.

FBI infiltrators routinely participate in all these and more First Amendment activities of the groups they infiltrate—often altering the group's course of action, sometimes considerably, or directly impairing its fundraising or recruitment efforts.

In fact, their impairment of First Amendment activity is even greater, because the FBI, in its quest for more information about a group, regularly encourages its infiltrators to penetrate the leadership circles, and financially assists them to do so. Nearly all of the many FBI domestic security informers who have been surfaced by the government held leadership positions at some level of the groups they infiltrated.

It is not inaccurate to characterize this FBI participation in the leadership of infiltrated groups as a partial, covert government takeover of independent political activity by private citizens. It unavoidably pierces the shield which the First Amendment was meant to erect between private political activity and government control.

All this detriment to First Amendment interests is inherent in the use of the technique. The "minimization" statement required by § 533b(b)(6) may help in other respects, but not these. Infiltrators who refused to participate in a group's activities would not long remain infiltrators, and those who avoided positions of responsibility would not learn much.

Beyond all this are two additional, singularly troubling problems inherent in the use of infiltrators. First, they are the least controllable of investigative techniques, and the most prone to outrageous excess. A telephone wiretap, unlike an infiltrator, cannot be fatal to Viola Liuzzo. Pro forma warnings to informers, required in the past by FBI manuals and now to be required by the bill, have not prevented the many instances of FBI informer misconduct recorded by recent history.

Second, the FEI's use of infiltrators in political groups casts a demoralizing cloud of uncertainty and mutual mistrust over the members, not only of the infiltrated groups, but of any groups who believe they might be infiltrated. Countless hours have been diverted from political activities to internal spy-purging. Some groups have literally disbanded as a result of mutual suspicions; individual careers have been ruined.

In short, the direct aggregate destructive impact of FBI infiltrators on the First Amendment activities of political groups outstrips that of any other surveillance technique, including those for which "probable cause" is already required. Before unleashing such an inherently intrusive and subversive investigative method on a political group, the government ought to have at least that minimal assurance which a showing of probable cause provides, as evidence that the group is in fact engaged in criminal conduct serious enough to justify the high constitutional costs of infiltration.

We therefore urge the inclusion of the "probable cause" concept along with the other elements in the definition of "necessity" for purposes of § 533b(b)(6).

If the FBI claims convincingly that such a standard would severely hamper investigations of terrorist groups—and factual support (which we do not believe exists) should be demanded for any such claim—then a "probable cause" standard could and should still be required for infiltration of non-terrorist political groups. In all events, "probable cause" should be required before an FBI infiltrator is permitted to assume a policy making or leadership position at any level of a political group, because of the additional First Amendment concerns, over and above those of "grass roots" infiltration, entailed in infiltration at leadership levels.

### *3. The procedure for infiltration of political groups*

The bill's proposed procedure for authorization of infiltration of terrorist groups under § 533b(b)(6) [which we propose be extended to all political groups] includes a written finding of necessity and minimization statement by a "senior" FBI official.

However "necessity" may be defined, or whatever other standard may be adopted, the decision whether the standard is met in a particular case should not be left entirely to FBI officials.

This principle does not rest on a questioning of the good faith judgment or integrity of current FBI officials. Rather, it reflects two more general principles. First, decisions to use the most intrusive investigative techniques, requiring a careful assessment of their law enforcement value in a constitutionally sensitive context, ought to be made by objectively disinterested officials. It implies no criticism of FBI officials to observe that they have a legitimate institutional interest in law enforcement, and thus are not as objectively disinterested as federal magistrates or high Justice Department officials whose spheres of responsibility are broader than those of FBI officials.

Second, external accountability in the use of constitutionally sensitive powers, by itself, offers some safeguard against abuse. An FBI decision to infiltrate a political group is more certain to be in complete compliance with the Charter if it is concurred in by a magistrate or high Justice Department official. FBI officials, knowing that responsible officials outside the Bureau must approve a proposed infiltration of a political group, will be more likely to reach the decision with the utmost care and attention it is due.

We propose, therefore, that infiltration of political groups be conditioned, first, on written approval by the Attorney General or his designee among senior Justice Department officials outside the FBI, and, second, on the issuance of a warrant, based on a showing that the infiltration is "necessary", by a federal magistrate.

In most cases, the practical difference between written findings by a senior Justice Department official which are subject to subsequent judicial and congressional review, and prior approval by a magistrate, will be slight. However, in a decade in which two attorneys general have been convicted of significant crimes committed while in office, the public cannot be confident that high Justice Department officials will never permit their judgment to be influenced by improper political considerations. Magistrates—whose participation is in any event desirable as an additional external check—are generally less likely to be susceptible to the political whims of a particular Administration.

There should be no need for the FBI to reveal the identity of an informer in the papers submitted to the magistrate. Where circumstances might tend to suggest the identity of an unnamed informer, appropriate in camera and security procedures could be observed. Warrant proceedings are, of course, *ex parte*, and raise no question of disclosing the identity of an informer to any opposing party.

The question of warrant proceedings before a magistrate must be kept separate from the question of the "necessity" standard and whether it must include "probable cause." Even if Congress were to settle on a lesser standard, of necessity, the decision whether it is met could and should still be made by a magistrate.

If—despite the advantages and absence of disadvantages in requiring a warrant from a magistrate—Congress nonetheless chooses not to require it, infiltration decisions should remain subject at least to approval by high Justice Department officials. Particularly if the decision is left to these officials, the argument for the high standard of "necessity" proposed earlier is even stronger, since any judgmental leeway would then remain entirely within the discretion of senior executive branch law enforcement officials.

#### 4. Preliminary inquiries into the suitability of potential infiltrators.

Section 533b(b)(4)(A) directs the FBI to conduct preliminary inquiries concerning any person being considered for use as an informer. While it specifically bars the use of mail or electronic surveillance, investigative demands and access to tax records in such inquiries, neither the bill nor the Commentary erects any standard or procedure for the conduct of such inquiries.

Particularly when the potential informer is a member or associate of a political group under consideration for possible infiltration, it is important that such inquiries not be permitted on the basis of subjective conjecture by low-level agents or supervisors, or even on the basis of approval by higher officials without adequate justification. The example of the so-called "background investigation" of Daniel Schorr looms too large in recent memory to permit inquiries into the political "reliability" of persons who are suspected of no crime but who are investigated merely because they might potentially assist the government.

The Commentary to § 533b(b)(4)(A) should therefore be clarified to require advance written approval of such inquiries by officials at FBI Headquarters, spelling out the intended use of the potential informer. If he or she is being considered as a possible infiltrator, a written, preliminary finding of "necessity" for the infiltration should be required from the appropriate senior FBI official before the suitability inquiry is authorized.

We presume that standards and procedures along these lines are intended in any event, and that explicitly requiring them by a clarification of the Commentary should not prove controversial.

### V. INDEPENDENT AUDIT OF FBI INFORMERS' ACTIVITIES<sup>23</sup>

Independent audit of the activities of FBI informers, both by the Congress with the aid of the General Accounting Office, and by the federal courts upon proper showings in civil litigation, is essential to ensure that the use of informers does not create a secret enclave within which FBI officials and field agents perceive that they can operate with absolute immunity from effective outside scrutiny. At the same time, the physical safety and intelligence value of FBI informers must not be needlessly jeopardized.

The bill would affect both congressional audit of FBI informer activities, apparently by leaving it unchanged from its current unsatisfactory state (§ 537c), and judicial review of informers' activities, by cloaking informers in additional secrecy (§ 7 of the bill, adding a new 28 U.S.C. § 513a(a)).

We will not presume to advise the Congress on how best to conduct its own oversight of FBI informers' activities.

<sup>23</sup> Comment by Senator Bayh: "I am convinced that all those engaged in the charter committed to the development of a workable mechanism for independent audit and review in the area of informants, consistent with protecting the safety of FBI informants." (Cong. Rec., 7-31-79, S. 10999.)

However, we take strenuous exception to the bill's provision which would for the first time totally prohibit court-ordered disclosure of informers. The proposed new 28 U.S.C. § 513a(a) would provide, in part:

"In no event may a court order an attorney for the Government or any other official of the Department of Justice to disclose the identity of a confidential informant or information which would reveal such identity, except to the court in camera, if the Attorney General has made a determination that the informant's identity must be protected." (Emphasis added.)

This would absolutely bar federal courts from ordering disclosure of information which would identify FBI informers to lawyers under protective orders in civil litigation. Because much of the information in FBI files tends to identify the informers who collected it, the effect of the provision would be to keep secret not only informer's names, but extensive portions of FBI surveillance files, even files which were closed years ago.

This provision is unjustified and unwise. According to the accompanying Commentary, "This language makes explicit the authority of the Attorney General to assert a claim of privilege in the courts." But if that is its purpose, then it is utterly unnecessary. The courts have emphatically recognized this authority. In *re* Attorney General, 596 F. 2d 58 (2d Cir. 1979).

The Commentary adds that the provision "is not intended to affect the power of the federal courts to rule on claims of privilege or to apply presumptions or sanctions . . ."

While this is literally true, the provision would greatly limit that power by prohibiting courts from ordering any disclosure to lawyers for adverse parties, even under appropriate protective orders in the most compelling of cases, if the Attorney General objects.

The provision would thus: (1) remove from the federal courts a power which they now possess; (2) do so when the propriety of particular orders invoking that power is at issue in two major pending cases; and (3) necessarily foreclose the contempt sanction which the courts have reserved for use in extraordinary cases of compelling need (no contempt citation could issue because there could be no disclosure order to violate).<sup>28</sup>

This provision is an attempt by the Justice Department and the FBI, in one of the provisions which the Commentary calls mere "technical amendments," quietly to win in Congress what it has failed to win in the courts: absolute immunity from court-ordered disclosure of informers, even in the most compelling of circumstances.

Voluminous evidence and briefs and lengthy court opinions have been devoted to a thorough and still pending consideration of this issue in the courts. They have proved themselves fully sensitive (indeed too sensitive) to the government's concerns. They have ordered disclosure only rarely, upon a showing of compelling need, and then only under strict protective orders, and have yet to enforce these orders to compel actual disclosure in cases when the government refused.

If Congress chooses to address this question, it should encourage the courts to require disclosure in proper cases with appropriate safeguards, not prohibit them from doing so. Permitting no disclosure to adverse parties of all information in FBI files which tends to identify an informer—i.e., most evidence of informer conduct and misconduct—cripples effective judicial review of FBI domestic intelligence surveillance, and denies adequate redress to citizens whose constitutional rights are violated by FBI informers.

The government's claims that disclosure to lawyers of evidence concerning domestic intelligence informers would endanger both the informers and FBI intelligence capabilities, are grossly overstated. Although such claims might be credible with respect to informers on organized crime or violent groups, they are not credible in the case of nearly all domestic intelligence informers. The govern-

<sup>28</sup> The state of recent case law on court-ordered disclosure of government informers in civil suits is as follows:

The federal courts have the power to order disclosure of informers upon a strong showing of need, subject to appropriate protective orders. *Hampton v. Hanrahan*, 600 F. 2d 600, 635-39 (7th Cir. 1979) (Chicago police informer); *In re United States*, 565 F. 2d 19 (2d Cir. 1977), cert. denied, 436 U.S. (962 (1978)) (FBI informer).

At least two district court judges, in New York and Chicago, have exercised this power to order disclosure of FBI informers to attorneys for adverse parties, under strict protective orders against further disclosure. See *In re Attorney General*, supra, 596 F. 2d at 60; *Alliance to End Repression, et al. v. Rockford, et al.*, 75 F.R.D. 441, 445-56 (N.D. Ill. 1977), modified and reaffirmed upon reconsideration (Mar. 13, 1979). However, the New York order has not been enforced to compel actual disclosure, 596 F. 2d at 67-68, and the Chicago order has also not yet been enforced and is now pending further reconsideration (Orders of April 9 and April 30, 1979).

The authority of courts to enforce such disclosure orders by sanctions other than contempt has been upheld, and the contempt power is apparently available in extreme cases based upon an extraordinary showing of need. *In re Attorney General*, supra, 596 F. 2d at 65-68.

ment itself, sometimes for insubstantial purposes, has publicly exposed scores of FBI domestic intelligence informers, with no serious harm resulting either to the informers or to the government.

In any event, it would be imprudent for the Congress, on the basis of a necessarily limited consideration of a two-sentence "technical" appendage to a lengthy and complicated bill, to force the courts to relinquish their power ever to order disclosure of this evidence in any civil litigation. Unlike the governance of the FBI which is the subject of the great bulk of the bill, this evidentiary disclosure issue is squarely within the province and expertise of the courts. Unless the Congress is inclined to give this issue the thorough attention it is due (which we believe would demonstrate the need for more, not less, access to informer evidence in civil litigation), it should simply delete the two sentences of the bill which propose to prohibit all court-ordered disclosures. Deleting them would neither compel nor prohibit any disclosures, but would merely leave the issue in the courts.

#### IV. A CIVIL REMEDY FOR SUBSTANTIAL CHARTER VIOLATIONS WHICH WILL NOT UNDULY INTERFERE WITH ONGOING INVESTIGATIONS <sup>27</sup>

We are concerned by the implications of Director Webster's recent statement (Chicago Sun-Times, 8-28-79, p. 27) that "enforcement mechanism are abundant"—with no reference to any new civil remedies, whether by amendments to the charter bill, the federal tort claims act, or otherwise.

Director Webster appears to assume—without foundation, we believe—that existing civil remedies for FBI misconduct are adequate. After four years of litigating a constitutional class action against the FBI in which the end is not yet in sight, we can testify from firsthand experience that existing remedies are impractical.

Roughly speaking, there are two kinds of existing civil suits: narrowly focused suits brought on behalf of a particular victim of alleged FBI misconduct <sup>28</sup> or which challenge a particular surveillance technique, <sup>29</sup> and across-the-board actions which seek to enjoin an entire interconnected pattern of abusive techniques and investigations affecting a broad class of citizens. <sup>30</sup> Neither kind is satisfactory.

Existing civil remedies in either case are too slow, too expensive and too uncertain. At the outset they typically face a battery of technical legal objections concerning jurisdiction, standing and the existence of a cause of action. Once these preliminary hurdles are crossed (after months or more of briefing), the suits generally face years of procedural maneuvers and discovery delays, during which they are all the more susceptible to time-consuming legal objections, because no one knows for certain what the ultimate rules of decision will be. This uncertainty also discourages settlements, by permitting each party to believe that its legal position may well ultimately prevail.

These and the further problems described below discourage most such suits from being filed in the first place, and effectively terminate others by attrition before any decision on the merits.

Once all the evidence is eventually in (in those relatively few suits which survive to this point), the burden of decision facing the federal judge is terribly difficult. In the narrowly focused suits, in determining the constitutionality of a particular investigation or investigative technique, the judge is asked to weigh its law enforcement value against its impact on constitutional rights. Unlike the Congress, which in enacting a charger can evaluate a single investigation or technique in the context of an extensively documented over-all picture, the judge must perform this delicate task relatively "in isolation," on the basis of the record in the single case before him, which may or may not fairly reflect the real value or impact of the practice at issue.

<sup>27</sup> Comment by Senator Biden: "On the matter of civil remedies proponents of the charter contend that the Department has been attempting to develop amendments to the Federal Tort Claims Act which would create a civil remedy against the Government for so-called 'constitutional torts' . . . My two concerns are that the Justice Department's idea of what a constitutional tort is is so narrow that it would not create a remedy for an innocent American who is smeared by the FBI . . . My other concern is that the tort claims may not be enacted. Therefore, I would rather that the tort claims bill be consolidated with the charter and that it be broadened to cover many of the more serious prohibitions covered in the charter." (Cong. Rec., 7-31-79, S. 10998.)

<sup>28</sup> E.g., the Socialist Workers Party litigation in New York, most recently reported in 506 F. 2d 58 (2d Cir. 1979).

<sup>29</sup> E.g., the mail cover case, *Paton v. LaPrade*, 469 F. Supp. 773 (D.N.J. 1978).

<sup>30</sup> No such cases have progressed very far, except for the Chicago class action litigation, *ACLU, et al. v. Chicago, et al.*, and *Alliance To End Repression, et al. v. DiLeonardi, et al.*, described generally in 565 F. 2d 975 (7th Cir. 1977).

Moreover, the extensive efforts of courts and litigants in the few such cases which reach a decision on the merits result, at best, in only chipping away at tiny fragments of the many question addressed in the FBI Charter bill. Several decades will pass before the courts, in these sorts of cases, can even reach most of the questions now before the Congress. And if and when they do reach them, the courts will be permitted to decide only their constitutionality, not whether they should be permitted or remedied as a matter of sound public or legislative policy.

Different problems are presented by class actions alleging a broad pattern of wrongdoing and challenging an entire array of investigations and surveillance techniques. Such suits are mammoth undertakings, requiring years to pursue and the expenditure of hundreds of thousands of dollars. The Chicago class action litigation has to date received financial and other support from nearly every major public interest and civil liberties group in Chicago, assisted by the generosity of many interested foundations. Plainly it would be difficult, if not impossible, to mount another such effort in Chicago in the foreseeable future. In most cities and rural areas, no such major effort would have been feasible in the first place.

When the case does come to trial, the task facing the federal judge will be awesome: he must singlehandedly decide, on the basis of a massive record, the constitutionality of a broad range of FBI domestic intelligence practices. Anyone who has attempted to digest all the provisions of the FBI Charter bill can appreciate the enormity of this task. Yet there are few clear rules of decision to guide the judge, and none would be added by the bill: § 537a(b) specifically provides that nothing in the bill or its implementing guidelines and procedures "creates any substantive or procedural right and no court has jurisdiction over a claim" based solely on an alleged violation.

What is needed in the charter is a civil remedy for substantial charter violations which, on the one hand, will resolve questions of jurisdiction, standing, and cause of action while providing clear rules of decision, and which, on the other hand, will not unduly interfere with ongoing FBI investigations.

We are confident that such a remedy can be devised. We are currently drafting a proposed civil remedy provision which we will submit prior to the Senate Judiciary Committee hearings on remedies, which we understand are presently scheduled for October 24, 1979.

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**STATEMENT OF DOUGLASS W. CASSEL, JR., STAFF ATTORNEY FOR BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, CHICAGO, ILL.**

**Summary**

**IN GENERAL**

Business and Professional People for the Public Interest ("BPI") is a nonprofit law center in Chicago. BPI's general knowledge concerning FBI investigative practices is based in part on extensive review of FBI domestic intelligence files. We believe it is important that the FBI be able to conduct vigorous and effective investigations of crime. We believe it is equally important to a free society that the FBI not engage in surveillance of lawful political activity.

Most of our suggestions propose clarifying amendments designed to articulate more effectively the bill's central purpose to focus FBI investigations on criminal conduct, not on political activity protected by the First Amendment.

Clear standards in the Charter are of critical importance. In domestic security cases, "It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *United States v. Robel*, 389 U.S. 258, 265 (1967).

Our comments address only six aspects of the bill. Most significantly, we suggest stricter standards and procedures for infiltration of political groups. We also principally urge the creation of a civil remedy, which would not unduly interfere with ongoing investigations, for substantial Charter violations; elimination of state law crimes as a basis for FBI terrorist investigations, and other clarifications of the bill's terrorist provisions, including a "preparation" standard for investigating future terrorism; and an "about to" standard for investigating future "general crimes."

In addition, we suggest clarifications concerning the scope of investigations of political activists and groups, and deletion of the provision which proposes to take away the power of federal courts to order disclosure of certain information concerning FBI informers.

Although our full comments, designed to provide detailed information for staff use are necessarily lengthy they are organized by headings with a table of contents. Relevant comments made by sponsoring Senators when the bill was introduced appear in footnotes to each heading.

#### POINT-BY-POINT SUMMARY

##### 1. *Terrorist Investigations*

The definition of "terrorist activity" needs to be clarified to include only offenses serious enough to be called "terrorist" and to eliminate ambiguity (pp. 3-5 of our statement).

FBI terrorist investigations based on state law violations should not be authorized (pp. 5-8). This proposed expansion of FBI jurisdiction is unprecedented in domestic cases touching closely on First Amendment rights, constitutionally ill-advised, and would be an inefficient and unnecessary allocation of federal resources. The FBI's proper domestic jurisdiction in our federal system should remain to investigate violations of federal law.

A "preparation" standard should govern investigations of suspected future terrorism (pp. 8-14). The Commentary's "serious intent" standard is too vague in the First Amendment area, and would have little or no law enforcement advantage over a "preparation" standard. Properly defined, "preparation" begins well in advance of terrorist crimes, and for up to six months even before "preparation" begins, the FBI could conduct a preliminary inquiry using all or nearly all the investigative techniques which would be legally available even in a full investigation to detect evidence of preparation.

##### 2. *Investigating Future "General Crimes"*

The charter should permit investigations of future "general crimes" only if they are "about to" occur (pp. 14-19). Many "general crimes" could involve political activists and groups. It is important that the indefensibly prolonged FBI investigations of recent decades not be continued or resumed by granting unlimited statutory authority to investigate crimes which "will" occur in the indefinite future. Under an "about to" standard for full investigations, the FBI could still spend up to six months in a wide-ranging preliminary inquiry seeking to determine whether a crime is "about to" occur, and in many cases the FBI's authority to investigate conspiracies or attempts would give it an additional head-start.

However, as the bill apparently intends, conspiracy investigations must not be initiated solely on the basis of lawful speech or association protected by the First Amendment.

##### 3. *Scope of Investigation of Political Groups and Activists*

The charter should clearly state what it presumably intends: the FBI must conduct its investigations so as to minimize their infringement of First Amendment rights (and not merely their "intrusiveness"), and must take First Amendment impact into account as a factor affecting the scope of investigations (pp. 20-28).

The Commentary should give more detailed guidance concerning the scope of investigations of political activists and groups. Information about the First Amendment activities of political associates of a suspected criminal should not be collected unless relevant to the suspect's guilt or innocence, and terrorist investigations should focus on criminal conduct, not political affiliations. The proviso in the Commentary, that investigations must be confined to the criminal subgroup of a larger political organization, should be clarified.

##### 4. *Infiltration of Political Groups*

The bill now has no standards or procedures specifically governing infiltration of political groups. One set of provisions governs infiltration of any group, and another governs infiltration of suspected terrorist groups. We suggest that the standards and procedures for terrorist infiltration be clarified and strengthened, and applied to all infiltration of political groups (pp. 29-44).

The bill's standard for such infiltration is that it must be "necessary," but that term is not defined. Drawing on constitutional law and the bill's intent, we propose a definition which, in essence, would provide that infiltration of political groups is "necessary" (and thus permissible) when it is reasonably likely to obtain important evidence of a federal felony which cannot reasonably be obtained by other means, when there is probable cause of the crime, and when this law enforcement need outweighs the likely adverse impact on free speech and association (pp. 33-36).

The one controversial element of this should be the "probable cause" requirement. We argue that probable cause should be required, because infiltration of political groups is at least as intrusive, and is more detrimental to First Amendment rights, than other investigative techniques for which probable cause is now required (property searches and wiretaps) (pp. 36-41).

However "necessity" may be defined, we suggest that the decision whether this standard is met in a particular case should not be left entirely to the FBI, but should require at least Justice Department approval and, preferably, a judicial warrant (pp. 41-43).

Finally, we suggest that the standards and procedures for preliminary inquiries into the suitability of potential infiltrators be clarified (pp. 43-44).

#### **5. Court-ordered Disclosures Concerning Informers' Activities**

A so-called "technical" amendment in the bill proposes to take away the power of federal courts to order disclosure of information which would identify informers (a very substantial portion of most FBI surveillance files). This evidence is crucial to effective judicial review and citizen redress of FBI informer misconduct. With respect to domestic intelligence informers, there should be more, not less, access in civil litigation to evidence of their misconduct. However, unless Congress is able to give this question the thorough attention it deserves, it should be left with the federal courts, in which it is the subject of pending litigation (pp. 45-49).

#### **6. Civil Remedy for Substantial Charter Violations**

A civil remedy for substantial charter violations is needed because existing civil remedies for FBI misconduct are not practical or generally effective (pp. 50-54). We are confident that a remedy can be devised which will not unduly interfere with ongoing investigations, and will attempt to submit a draft prior to the Senate Judiciary Committee hearings on remedies scheduled for late October.

**SUPPLEMENTARY STATEMENT ON CIVIL REMEDY BY DOUGLASS W. CASSEL, JR.,  
STAFF ATTORNEY, BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC  
INTEREST, CHICAGO, ILL.**

#### **[DRAFT SUBSTITUTE § 537a]**

#### **CIVIL REMEDY FOR VIOLATIONS OF FIRST AMENDMENT POLITICAL OR RELIGIOUS FREEDOMS**

(a) Any individual or enterprise shall have a civil cause of action against any employee or agent of the Department of Justice, and against the United States, jointly and severally, if such individual or enterprise is aggrieved as a direct result of any act or omission, under color of law, by which such employee or agent authorizes or engages in—

(1) any activity for the purpose of limiting, disrupting or interfering with the exercise of any right to engage in lawful political or religious activity protected by the First Amendment;

(2) a substantial violation of section 531a (d)(1) or (d)(2), or (d)(3) to the extent it prohibits investigations based solely on the lawful exercise or any right to engage in lawful political or religious activity protected by the First Amendment;

(3) a substantial violation of the standard for terrorist investigations set forth in § 533(b)(3); or

(4) a substantial violation of any of the provisions in § 535a(a)-(d) governing collection of information on civil disorders and public demonstrations.

(b) Any political or religious enterprise or activist shall have a civil cause of action against any employee or agent of the Department of Justice, and against the United States, jointly or severally, if such enterprise or activist is aggrieved as a direct result of any act or omission, under color of law, by which such employee or agent authorizes or engages in a substantial violation of—

(1) the standard for inquiries set forth in section 533(a);

(2) the standard for investigations of general crimes set forth in section 533(b)(1);

(3) the standard for preliminary inquiries or investigations at the request of a foreign law enforcement agency, set forth in section 536a(4);

(4) the principles of focus and scope of investigations set forth in section 533a(a)(1) and section 533a(a)(3); or

(5) the restrictions on certain investigative techniques set forth in section 533b.

(c) The United States district courts shall have jurisdiction over any claim brought under this section without regard to jurisdictional amount or citizenship of the parties.

(d) Any action for a civil remedy under this section must be brought within two years of the date upon which the plaintiff discovers or should reasonably have discovered the facts giving rise to the cause of action.

(e) In any action brought under this section, the court may grant to the plaintiff—

(1) such temporary or permanent equitable relief, or other relief it deems appropriate, including, but not limited to, injunction and declaratory judgment; and

(2) actual and general damages, but not less than liquidated damages computed at a rate of \$250 per day for each violation, or \$2,500, whichever is higher, and punitive damages.

The court, in its discretion, may award reasonable attorney's fees and other litigation costs reasonably incurred to the prevailing plaintiff, or to the prevailing defendant if the Court finds that the action is frivolous and was brought in bad faith for the purpose of harassment.

(f) Proof that the alleged wrongful act or omission was committed in good faith shall provide the employee or agent a complete defense to a claim for money damages, attorney's fees and costs, or other order to pay money. Conclusive proof of good faith shall be established if the employee or agent relied in good faith on a written order or directive issued by an officer or employee with apparent authority to authorize the act or omission, or on a written assurance by legal counsel within the Department of Justice stating that the act or omission is legal. Notwithstanding the existence of a good faith defense for the employee or agent, the United States shall, if the employee or agent was acting under color of law, be liable for any damages actually sustained.

(g)(1) Upon recommendation of the FBI Director or of an Assistant Attorney's General, the Attorney General may pay reasonable attorney's fees and other litigation costs reasonably incurred by any employee or agent against whom a civil action is brought under this section.

(2) The court may award any employee or agent found not liable under this section reasonable attorney's fees and other litigation costs reasonably incurred if such costs are not paid under subsection (g)(1). Fees and costs so awarded shall be paid by the United States, except as provided in subsection (e).

(h) This section shall not apply to any cause of action arising from the interception or disclosure of a wire or oral communication in violation of chapters 119, 120 or 121 of title 18, United States Code, or chapter 36 of title 50, United States Code.

(i) Nothing in this section shall limit the existence of any civil cause of action otherwise available, provided that no court has jurisdiction over a claim in any grand jury or criminal proceeding, including a motion to quash a subpoena, suppress evidence, or dismiss an indictment, or in any civil proceeding to enjoin a grand jury or criminal proceeding, based solely on an alleged failure to follow a provision of this chapter or of guidelines or procedures established pursuant to this chapter.

## INTRODUCTION

### I. A CIVIL REMEDY TO PROTECT LAWFUL POLITICAL AND RELIGIOUS ACTIVITIES ONLY

The FBI Charter bill should be amended to provide a civil remedy for substantial violations of important Charter provisions, but only in cases involving the right to engage in lawful political or religious activity protected by the First Amendment.

Such a narrow remedy would speak to the overwhelming majority of past serious abuses which have generated public demands for FBI reform. As amply documented by the Church Committee Report, the FBI's excesses have historically focused on groups and persons engaged in controversial political activity.

Such a remedy would also help to answer the question which has been raised, Why single out the FBI for a civil remedy? The answer is that the FBI, by its unparalleled record of surveillance and harassment of political dissidents, has singled itself out.

In contrast, the FBI's record of proper and lawful conduct in its investigations of "general crimes" is not noticeably worse than that of most law enforcement agencies; indeed, the FBI's record may be better than most. Thus, except for cases involving so-called "subversives" or "extremists" like Dr. Martin Luther King and other persons whose politics have offended FBI officials, the Bureau has not "singled itself out" by its conduct, and therefore need not be singled out for a civil remedy.

A remedy focused on protecting lawful political and religious activity would also ameliorate fears that a flood of harassing lawsuits will be brought by criminals for the sole purpose of interfering with proper FBI law enforcement efforts. For example, criminal suspects in the FBI's high priority areas of organized crime and white collar crime tend to be precisely the sort of well-financed, well-represented, unscrupulous, high-stakes operators who would realistically pose the greatest threat of burdening the Bureau with harassing lawsuits. Yet such criminal elements would rarely, if ever, be able to assert a valid or even colorable claim by utilizing the civil remedy proposed here for political groups and activists.<sup>1</sup>

Thus, a civil remedy designed to protect only groups and persons engaged in lawful political or religious activity from serious FBI abuses would go far toward meeting the most serious objections which have been raised against the inclusion of any civil remedy in the Charter bill.

Such a civil remedy is needed, primarily, to ensure that the FBI and the government are externally accountable to citizens, and to the courts whose historic mission has been to safeguard political liberty, and, secondarily, to compensate victims of serious FBI misconduct. On the other hand, enactment of an FBI Charter with no provision for external enforcement by citizens through the courts will fail to restore tarnished public confidence in the Bureau and in congressional oversight of the FBI.

What is critical is that there be a civil remedy for political or religious groups or activists victimized by substantial Charter violations. The particulars of the remedy are less important. The specifics outlined in Part I of the rest of this statement (and the draft substitute § 537a submitted herewith) merely illustrate that such a remedy can reasonably be devised, and show what one draft of it would contain. Part II shows that a less desirable alternative—an across-the-board civil remedy for abuses by any federal law enforcement or intelligence agency, not "singling out" the FBI—is also possible, and would be preferable to passing an FBI Charter with no civil remedy provision at all.

#### SPECIFICS OF A CIVIL REMEDY TO PROTECT GROUPS OR PERSONS ENGAGED IN LAWFUL POLITICAL OR RELIGIOUS ACTIVITIES

##### A. Coverage—general

The remedy would provide any individual or "enterprise" (as already defined in the Charter bill) a civil cause of action against any employee or agent of the Justice Department who, under color of law, authorizes or engages in a substantial violation of designated provisions of the existing Charter bill, if the plaintiff is aggrieved as the direct result of the alleged act or omission. The United States would also be jointly and severally liable. [For similar language and scope, see S. 2525, 95th Congress, Second Session, (hereafter "S. 2525") § 253(a).]

Four kinds of substantial Charter violations would be remediable:

- (1) COINTELPRO-type disruption of lawful political or religious activity (§ (a)(1) of draft substitute § 537a);
- (2) politically motivated or otherwise unjustified surveillance of lawful political or religious activity (§§ (a)(2)-(4), (b)(1)-(3) of draft substitute § 537a);
- (3) authorized investigations which exceed their proper scope and unjustifiably intrude on lawful political or religious activity (§ (b)(4) of draft substitute § 537a); and
- (4) illegal use of sensitive investigative techniques in cases involving lawful political or religious activity (§ (b)(5) of draft substitute § 537a).

##### B. Specific Coverage

Substantial violations of only the following important provisions of the Charter bill would give rise to the statutory cause of action:

(1) *COINTELPRO-type disruption*.—To the maximum extent possible, the draft remedy proposed here merely provides a civil remedy for existing sections or parts of sections of the Charter bill. However, an exception to this remedial drafting approach is necessary for COINTELPRO-type disruption, because presently the Charter bill contains no explicit ban on such disruption. COINTELPRO is said by FBI Director Webster to be implicitly banned, but exactly what is banned is not clear. The Justice Department has apparently agreed to

<sup>1</sup> Of course, anyone can allege anything; there is no way to prevent loan sharks posing as civil rights advocates from filing frivolous lawsuits, using whatever remedy may be available. But such suits can be effectively discouraged and contained by a variety of means (discussed below) and would be given short shrift by federal judges. In any event, mobsters can already file frivolous *Bivens*-type actions alleging constitutional violations; they have no need of any FBI Charter in order to be able to file frivolous lawsuits.

draft an explicit ban on COINTELPRO disruption if requested. If and when that ban is included in the bill, a civil cause of action could arise whenever there is a substantial violation of it.

Otherwise the civil remedy provision could simply make it actionable to "authorize or engage in any activity for the purpose of limiting, disrupting, or interfering with the exercise of any right to engage in lawful political or religious activity protected by the First Amendment to the Constitution of the United States." (§ (a)(1) of draft substitute § 537a).

This language is based on the COINTELPRO ban proposed in § 253(a)(2) of S. 2525, but is narrower in that this remedy would protect only constitutional rights, not statutory rights, and only First Amendment political or religious freedoms, not all constitutional rights. These changes are designed to confine the civil remedy to Charter violations involving lawful political or religious activity, for the reasons stated in the Introduction.

Like the S. 2525 provision, this remedy would not exist when the COINTELPRO-type action is merely proposed. It would provide a remedy only when harm to political or religious freedom is truly threatened by an approved or executed act, but would not unduly inhibit FBI internal communications, as might a remedy for mere "proposals". Liability would attach only when disruption is authorized or engaged in, not before.<sup>3</sup>

(2) *Politically motivated or otherwise unjustified surveillance of lawful political or religious activity.*—A civil remedy should be available for substantial violations, affecting lawful political or religious activities, of charter provisions concerning investigations based solely on the exercise of constitutional rights; the threshold standard for terrorist, "general crimes," and foreign-agency-requested investigations; and civil disorders and public demonstrations.

Thus, it should be actionable to authorize or engage in a substantial violation of § 531(d)(1), which prohibits FBI investigations based solely on "a religious or political view lawfully expressed by an individual or group," and (d)(2), which prohibits investigations based solely on "the lawful exercise of the right to peaceably assemble and to petition the Government."

However, unlike §§ (d)(1) and (d)(2), § 531(d)(3) is not limited to First Amendment political or religious freedoms, but broadly bans all investigations based solely on the lawful exercise of any federal legal right. Only part of this broad substantive ban should be included in a remedy focused on political and religious rights. Therefore, a violation of § (d)(3) should be actionable only in cases of an investigation based solely on "the lawful exercise of any right to engage in lawful political or religious activity protected by the First Amendment." (§ (a)(2) of draft substitute § 537a). [This language parallels the COINTELPRO ban suggested earlier.]

It would also be actionable to authorize or engage in a substantial violation of § 533(b)(3), which articulates the threshold standard for terrorist investigations (§ (a)(3) of draft substitute § 537a). As the Commentary recognizes, terrorist investigations "deal with groups who have, or allege, a political motive for their [alleged or suspected] criminal activity and [their] criminal activities may be coupled with political expression which is protected by the First Amendment."

Similarly, substantial violations of the § 533(b)(1) threshold standard for investigating "general crimes," and the § 536a(4) threshold standard for investigations requested by foreign agencies, should be actionable in cases involving political or religious groups or activists §§ (b)(2) and (b)(3) of draft substitute § 537a).

Here we face the problem of defining "political or religious groups or activists." No perfectly precise definition is possible, but perfect precision is not required in a remedial statute. "Political group" should be broad enough to encompass not only political parties but also civil rights groups, anti-nuclear groups, antiwar groups, and similar issue-oriented groups which are "political" in the broad sense. Yet the definition must be narrow enough to exclude commercial enterprises and the crime syndicate. Many acceptable definitions are possible; one was included in a footnote in our initial statement. (Statement, Oct. 4, 1979, p. 32 note.) Regardless of how the term is defined, the accompanying commentary should make clear the congressional intent to accomplish inclusions and exclusions such as those suggested above.

<sup>3</sup> S. 2525 would require the disruptive act to be actually committed, not merely authorized. However, that limitation is in a damages provision of S. 2525 (§ 253), where it makes sense, and obviously should not limit the declaratory or injunctive relief authorized as part of the remedy proposed here and which, by definition, is directed toward future conduct.

(Similarly, "activist" could be variously defined; one definition would be "an individual engaged actively and substantially in lawful political or religious activities, or whose activities which are the subject of FBI inquiry or investigation are substantially political or religious in nature.")

Likewise, the standards for preliminary inquiries concerning general crimes (§ 533(a)) and foreign-agency requested inquiries (§ 536a(4)) should be enforceable in cases involving political or religious groups or activists (§§ (b)(1) and (b)(3) of draft substitute § 537a).

Finally, the provisions of § 535a governing FBI inquiries concerning civil disorders and public demonstrations should be enforceable by civil suit. Peaceful public demonstrations obviously involve lawful political or religious activity, and possible civil disorder was the asserted justification for much of the questionable FBI investigative activity documented by the Church Committee.

Subsections (a), (b), and (c) of § 535a provide standards and prohibitions which can simply be made enforceable (§ (a)(4) of draft substitute § 537a). Although subsection (d) purports only to describe the necessary elements of Attorney General guidelines, those elements—e. g., the ban on infiltration in inquiries into peaceful public demonstrations—can and should be made directly enforceable in the civil action (§ (a)(4) of draft substitute § 537a). Thus, the Commentary to the proposed substitute § 537a should make clear that one could sue an FBI official who improperly authorized such infiltration, and the fact that guidelines had been issued which also banned such infiltration would not block the suit.

(3) *Authorized investigations which exceed their proper scope and unjustifiably intrude on lawful political or religious activity.*—As detailed in our earlier statement (October 4, 1979, pp. 20–28), the effectiveness of the Charter's limitations on the scope of FBI investigations of political groups and activists who are suspected of crime will largely determine whether the FBI can continue to engage in unjustified political surveillance. If the slightest crime by a few members were enough to justify a full-blown, thorough investigation of a large and far-flung political group, the intent of the Charter would be severely undermined. Thus it is important that there be a civil remedy for political or religious groups or activists directly affected by substantial violations of § 533a(a)(1) of the Charter bill, which requires investigations to "focus on criminal activity for the purposes of detection, prevention, and prosecution of crime," and § 533a(a)(3), which provides that "the scope and intensity of each investigation shall be determined by the nature and quality of the information on which the investigation is based."

While these provisions are stated as principles to be embodied in Attorney General guidelines, like the public demonstrations provisions, they could and should be made directly enforceable by civil suit (§ (b)(4) of draft substitute § 537a). Although their articulation in the bill is quite general, a court in enforcing them would be aided by the commentary, which should be made clearer (see our Oct. 4 statement, pp. 20–28) and by the Attorney General guidelines.

(4) *Illegal use of sensitive techniques in cases involving lawful political or religious activity.*—Section 533b articulates restrictions on the use of various sensitive investigative techniques. Substantial violations of these restrictions in inquiries or investigations of political or religious groups or activists should be actionable (§ (b)(5) of draft substitute § 537a).

In addition if § 534(b) is clarified to prohibit political proprietaries, as the American Civil Liberties Union has recommended, that prohibition, too, should be civilly enforceable by affected political or religious groups or activists.<sup>3</sup>

### C. Safeguards Against Frivolous And Harassing Lawsuits

A number of safeguards against frivolous and harassing lawsuits are included in the remedy proposed here (the draft substitute § 537a). While it is impossible to devise a remedy which would guarantee that no frivolous suits could ever be brought, it is possible to minimize the number of such suits, to effectively discourage them, and to protect both FBI employees and proper FBI law enforcement operations from any significant burden resulting from such harassment. Additional safeguards could also be proposed. Those proposed here are as follows:

1. *Limit the civil remedy to protection of political or religious groups or activists.*—The reasons for this narrow remedial approach, which would make plainly frivolous all or nearly all suits filed by organized criminals, white collar racketeers, and others engaged in nonpolitical "general crimes," were explained in the Introduction to this Supplementary Statement.

<sup>3</sup> No provision is made for this in the draft substitute § 537a, because § 534(b), or at least its Commentary, would have to be amended first. If § 534(b) is so amended, then a remedy for its violation would simply be added to the draft substitute § 537a.

2. *Limit the civil remedy to "substantial" violations of important provisions.*—Only important provisions of the Charter bill (§§ 531a(d)(1), (d)(2), and (d)(3) in part; 533(a) in part, (b)(1) in part, and (b)(3); § 533a(a)(1) and (a)(3) in part, 533b in part; 535a(a)-(d); and § 536(a)(4) in part), all affecting the exercise of First Amendment rights to engage in lawful political or religious activity, have been made enforceable by the proposed civil remedy. In addition, all the provisions, except the remedy for inherently serious COINTELPRO-type disruption, require that a violation by "substantial" in order to be actionable. This would permit a Court to dismiss, upon motion, at the outset of the case, any allegation of a minor violation which is merely technical or de minimis in nature. In other cases, a Court might adjudge a violation insubstantial, and thus not actionable, after discovery (which need not be burdensome; see (3) and (4) below).

3. *Protective orders against harassing discovery.*—Rule 26(c) of the Federal Rules of Civil Procedure authorizes the court, upon motion, to prohibit or limit discovery when justice requires that a party be protected from "annoyance, embarrassment, oppression, or undue burden or expense." This authority to move for "protective orders," which the government has not hesitated to invoke in pending and past FBI litigation, would of course be available in the civil action proposed here.

4. *Evidentiary privilege for information concerning ongoing law enforcement investigations.*—Common law privileges as interpreted by the federal courts would limit discovery in civil actions brought under the proposed remedy. (Rule 501, Federal Rules of Evidence.) One such recognized privilege is the privilege against disclosure of law enforcement files, especially files relating to ongoing investigations. E.g., *Philadelphia Resistance v. Mitchell*, 58 F.R.D. 139, 142 (E.D. Pa. 1972). While the privilege is not absolute, and may be overcome if the passage of time renders the files no longer sensitive or if there is a showing (not merely an allegation) that the files contain evidence of serious governmental illegality, e.g., *Black v. Sheraton Corp.*, 371 F. Supp. 97, 102 (D.D.C. 1974), it would prevent discovery from being used to interfere with or to disclose information about ongoing FBI investigations (absent a persuasive showing that the investigation is being conducted in violation of the Charter or the Constitution). And even where a showing is made that an investigation is being conducted illegally, the Court could of course order disclosure only in camera or pursuant to a protective order. E.g., *Kerr v. United States District Court*, 426 U.S. 394 (1976).

In addition, evidentiary privileges also exist to protect the FBI from disclosure of its law enforcement techniques and methods, e.g., *Jabara v. Kelley*, 62 F.R.D. 424 (E.D. Mich. 1974) and *United States v. Imbrunone*, 379 F. Supp. 256 (E.D. Mich. 1974).

5. *Good faith defense.*—Proof of good faith, which can be established by circumstances or conclusively by reliance on written orders from superiors or advice of counsel, would be a complete defense for an employee or agent who is sued (§ f of draft substitute § 537a). Nonetheless, to afford compensation to victims of substantial Charter violations, the United States would remain liable for actual damages regardless of the employee's good faith. (These provisions are modeled on § 253(d) of S. 2525.)

6. *Attorney's fees for defendants.*—The civil remedy would authorize payments or awards of attorney's fees to defendants, thus simultaneously protecting FBI employees from burdensome legal costs, and discouraging harassing lawsuits.

Section (e) of § 537a (modeled on civil rights attorney's fee statutes as interpreted in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)) would authorize awards of attorney's fees against plaintiffs who file frivolous actions in bad faith for the purpose of harassment. This would particularly discourage such suits by well-financed criminals, e.g., loan sharks who might seek to pose as civil rights advocates.

In addition, section (g) of the draft substitute § 537a (modeled on § 258 of S. 2525) would authorize the Attorney General to pay a defendant's reasonable fees and costs from the outset, and further would authorize awards of attorney's fees payable by the United States to a defendant employee or agent found not liable. Thus, in cases where a defendant employee prevails, but cannot recover fees from the plaintiff because the suit was brought in good faith or the plaintiff is insolvent, and the Attorney General for whatever reason refused to pay his fees from the outset, the defendant employee would still be entitled to an attorney's fee award from the government.

## II. AN ACROSS-THE-BOARD REMEDY FOR COMPARABLE VIOLATIONS BY EMPLOYEES OR AGENTS OF ANY FEDERAL LAW ENFORCEMENT AGENCY

For the reasons stated in the Introduction to this Supplementary Statement, it is fair and reasonable to "single out" the FBI for a civil remedy limited to substantial Charter violations affecting lawful political or religious activity protected by the First Amendment.

Section I of this Supplementary Statement (and the accompanying draft substitute § 537a) demonstrate another reason why a remedy applying specifically to the FBI is preferable to an across-the-board remedy applying to all federal law enforcement agencies: the remedy needs to be tailored to each individual agency, in order to balance that agency's particular law enforcement needs against the most serious harms to the public which are likely to result from violations of that agency's distinctive charter (or other governing laws).

For example, it is by no means clear that our proposed civil remedy for substantial violations of the Charter's standard for FBI terrorist investigations could simply be applied across-the-board to agencies with no terrorist jurisdiction or different investigative scope. A more general remedial provision would have to be devised to cover all federal law enforcement agencies, one which could not be as selective—or as fair to the public and to the FBI—as the carefully limited remedy proposed in Section I.

If an across-the-board remedy is nonetheless desired, one can be reasonably drafted, and would be preferable to no remedy at all. The substantive coverage of such a remedy might read as follows:

"Any person shall have a civil cause of action against any employee or agent of any federal law enforcement of intelligence agency, and against the United States, jointly and severally, if such person is aggrieved as the direct result of any act or omission by such employee or agent which is committed under color of law, and which violates any right of the aggrieved person to engage in lawful political religious activity protected by the First Amendment to the Constitution of the United States."

Like the draft substitute § 537a proposed in Section I above, this across-the-board remedy would focus on the rights to engage in lawful political or religious activity protected by the First Amendment. It would not authorize liability on the basis of a mere statutory violation, but only on the basis of a constitutional violation. The Commentary to the provision could make clear that the court, in interpreting the application of the Constitution to a particular agency's activities, could consider but would not be bound by specific statutory provisions in the Charter or other laws governing the agency.

Other provisions of the remedy—jurisdiction, limitations, relief, good faith defense, payment of defendant's attorney's fees, etc.—could parallel those of the draft substitute § 537a proposed in Section I above.

While such a provision would have the disadvantage of affording no remedy for serious statutory violations which do not amount to constitutional violations, it would have the advantage of ensuring a remedy for violations of First Amendment political or religious freedoms by federal law enforcement or intelligence agencies. This advantage is important, because it is not now clear whether a *Bivens*-type constitutional remedy would be allowed by the courts for all such violations.<sup>4</sup>

## TESTIMONY OF DOUGLASS W. CASSEL, JR., STAFF ATTORNEY FOR BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST

Mr. CASSEL. Thank you very much, Chairman Edwards, Representative Drinan. I don't propose to read back to you that detailed legal document that I submitted entitled "Supplementary Statement," nor in my opening informal introduction to go into the details of that, but to leave that to questions that the committee members and counsel may have.

<sup>4</sup> For example, under *Davis v Passman*, 60 L.Ed. 2d 846, 862 (1979), a *Bivens*-type remedy may be unavailable in cases presenting "difficult questions of valuation or causation." Such questions are often presented by the infringement of intelligence-gathering activities on First Amendment political or religious freedoms. Nearly every civil remedy proposed in recent intelligence agency bills (e.g., S. 2525, or the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1810(a)) has recognized this difficulty by including a liquidated damages provision. However, though liquidated damages are commonly and properly authorized by Congress in its legislative discretion, they could rarely, if ever, be authorized by the courts, and thus no *Bivens* remedy might be allowed for many intelligence agency violations of constitutional rights.

I thank you, Chairman Edwards, Representative Drinan, Committee Counsel, for the privilege of appearing before you today and also for the time and attention that you are devoting to a matter which in some periods in American history has not always been given the attention it deserves. I think that the performance of the Congress at this time is a model that I hope will be emulated in the future.

BPI, a nonprofit law center in Chicago for which I work, is involved in a variety of civil rights, environmental and civil liberties litigation. One of the suits in which we represent Chicago community groups and civil liberties groups is a class action against the FBI and the Chicago Police Department and other intelligence agencies for a wide variety of alleged violations of political and religious freedoms.

The complaint in our case reads like a condensed version of the Church committee report. It covers almost the entire spectrum. In the course of 5 years of discovery in the lawsuit, we have, therefore, had occasion to address almost the entire spectrum of misconduct alleged, reported, and documented or admitted by the alleged wrongdoers in the Church committee report.

We have encountered in the course of the lawsuit vigorous resistance from the Justice Department to any theory of liability whatsoever for any of the violations documented in the Church committee report or any of the numerous violations documented in the evidence we have produced so far.

Our position with respect to the civil remedy in the charter is that there must be a remedy, because existing remedies, in my opinion, contrary to the testimony of the previous witness and the position of the Justice Department, are demonstrably inadequate; but that the remedy should be very carefully devised, frankly for political reasons in part, because a broad remedy with no limitations whatsoever has no chance of passing the Congress, and also for policy reasons.

Many of the concerns expressed by Mr. Murphy and by the FBI and the Justice Department concerning frivolous and harassing lawsuits are legitimate policy considerations that need to be taken into account, but they are not so wide sweeping that they need bar the availability of any remedy whatsoever.

What I have attempted to do in the statement I have submitted to this committee is simply to supply one example of how one could draft a bill which would both meet the most serious needs of the victims of FBI misconduct and at the same time build in a number of safeguards sufficient to protect against the kind of frivolous and harassing lawsuits the FBI is legitimately concerned about.

Without going into the list of specific violations that I propose be included in the charter, I think I can sum them up under one rubric: There ought to be a civil remedy for substantial charter violations of political and religious freedoms. I have picked a number of specific provisions of the bill which I think protect such freedoms. A civil remedy as enacted by the Congress or as drafted by this committee might take that detailed approach which I have, or that might be left to the committee report or legislative history, and there might simply be a one-sentence civil remedy for substantial charter violations of political and religious freedoms.

That might be a preferable alternative in terms of clarifying the arguments for everyone involved. But the kind of detail that I went into in attempting to specify what would and would not be a remedy

would have to be laid out for purposes of guidance, at least in the committee report, in order to avoid the objections of the FBI and the Justice Department that if we create any kind of civil remedy at all, that the loan sharks and organized crime people would come in under the guise of civil rights groups and attempt to abuse them.

I think it is important that the remedy be clear, either in the bill or in the committee report, as to what it covers. I think it is equally important that there be protections against frivolous and harassing suits specifically, no liability on the part of individual FBI agents or officials for good faith actions, no cause of action for minor technical violations, no cause of action for violations not affecting political or religious freedoms—which would keep organized crime and people engaged in general crimes from attempting to halt FBI investigations through a civil remedy—and finally, a provision for attorneys' fees, comparable to that which already exists in the Civil Rights Act, to be awarded in favor of the defendant law enforcement officers when a plaintiff files a frivolous suit in bad faith for purposes of harassment.

I'm sure the chairman and members of the committee and counsel have a number of questions about the adequacy of alternative remedies. I think at this point, unless you would like me to address that subject generally, I will reserve the rest of my time for any questions the chairman or others may have. Thank you.

MR. EDWARDS. Thank you, Mr. Cassel. I believe that this would be an appropriate time for us to recess for a vote. We will return in 10 minutes.

[Recess.]

MR. EDWARDS. The subcommittee will come to order. The gentlemen from Massachusetts, Mr. Drinan.

MR. DRINAN. Thank you. I want to welcome our witness again and commend him on all the work that he has done and just to say that this is precisely the type of scholarly and highly professional work that this subcommittee needs in order to clarify our minds on any of the proposed charters.

I thank you, Mr. Chairman.

MR. EDWARDS. Mr. Cassel, it was the testimony of Mr. Murphy that there were and are adequate provisions in the law now to protect people where they might have a cause of action against the United States or a police officer working for the United States. Mr. Murphy said that an FBI agent, shall we say, has committed a tort against a private individual or perhaps a criminal tort, that he can become the object of a criminal charge or sued in the State court for civil action, charged in Federal court for violating the civil rights of the person, sued in a civil action in Federal court for having violated the constitutional rights of the citizen, and finally be subjected to internal disciplinary sanctions and so forth.

Do you disagree that those remedies are adequate?

MR. CASSEL. I certainly do, Chairman Edwards. I think this is peculiarly one of the issues that needs to be looked at from a non-partisan point of view. Many of the issues in the charter have to do with, in part, value judgments between the extent to which one protects civil liberties and the extent to which one protects vigorous law enforcement; trade-offs have to be made.

But the particular question, whether existing remedies do what Mr. Murphy says they do, is a legal question that needs to be looked

at dispassionately by lawyers. Obviously, you can't prevent one's views of priorities between civil liberties and law enforcement from having some involvement in that decisionmaking process, but it's by and large a lawyer's judgment.

And my judgment as a lawyer and, I think—contrary to what Mr. Murphy said—the judgment of anyone or most people who have studied this issue carefully, is that existing remedies are not adequate. The most significant existing remedy that Mr. Murphy and others allude to is the *Bivens* constitutional tort suit. The limitations of that are numerous. First, *Bivens* even if it were fully extended to all provisions of the Bill of Rights, would protect only against constitutional violations, violations of the Constitution. There are a number of significant provisions in the FBI Charter, such as the regulation of infiltration of groups, which have not yet been held by the courts to rise to the level of constitutional violation but which are nonetheless very important protections for the privacy and the political freedom of Americans—is important that even the FBI and the Justice Department have recognized the need to include them in a governing statute.

None of those nonconstitutional but nonetheless very important provisions of the charter can now be remedied in a *Bivens* suit or could be remedied in a *Bivens* suit after this charter is passed, if it contains no civil remedy.

Second, I think Mr. Murphy vastly overrates the extent to which the *Bivens* decision, creating a cause of action in damages for a particular kind of violation of the fourth amendment right, has been extended to other rights. The Supreme Court has extended *Bivens* to only one other provision of the Constitution, in one set of circumstances, and that's the case of *Davis v. Passman* at 60 L. Ed. 2d 846, decided this year, in which the Supreme Court held that an allegation of sexual discrimination in employment against a Member of Congress was remediable directly under the Constitution, given the absence of a statutory cause of action.

But the reasoning of that decision—it needs to be read carefully—along with the reasoning of *Bivens* makes it absolutely clear that *Bivens* does not automatically extend to any other constitutional violation. Rather, the violation of constitutional rights can be remedied under *Bivens* only “if there are not special factors counseling hesitation in the absence of affirmative action by Congress.”

The Court then goes on to list a number of the special factors that might lead the Court not to create a *Bivens* remedy. Among those special factors are the following of particular interest in the context of the FBI Charter: Relief in damages, the Court implies, must “present a focused remedial issue without difficult questions of valuation or causation.”

Valuation and causation. In the context of an FBI violation, the question would be, for example, how do you place a dollar price tag on the injury to one's first amendment interests caused if the FBI infiltrates a group which is not engaged in any illegal conduct? How do you place a price tag on that? This is a very difficult question of valuation, and for that reason alone, the court might decline to create a *Bivens* remedy for the infiltration of a lawful political group, because the court could not place a precise dollar value on the loss; although the court could recognize it could be a substantial loss.

**Causation:** Suppose the FBI infiltrates a group. The FBI's infiltrator, as they frequently do, becomes one of the leading officers of the group. During the 2 years that follow the infiltration, the group loses membership by 10 percent, and its financial contributions drop by 10 percent. There you have a concrete loss that you can value—10 percent of the group's budget has been lost. But how much of that is because of the disruption or influence of the FBI agent and how much of it is because the group is no longer as popular with the public as it once was. This is a very difficult question of causation.

For that reason alone, the court might decline to create a Bivens constitutional remedy for infiltration of a political group. The way that Congress can deal with those kinds of problems of valuation and of causation is to create a liquidated damages remedy in the alternative. If the plaintiff cannot show actual damages with precision in a situation like that, Congress can create a liquidated damages remedy.

In fact, every intelligence bill, every intelligence law which Congress has passed in recent years or which has been introduced in recent years, with which I am familiar, has included a liquidated damages provision for precisely that reason. The Foreign Intelligence Surveillance Act that was passed last year contains a liquidated damages provision. S. 2525, the Foreign Counterintelligence Charter introduced last year by Senator Bayh contains a liquidated damages provision. It recognizes the very difficulty which would lead a court very likely not to create a Bivens cause of action for at least some serious violations of political freedoms by FBI agents violating restrictions of the charter.

Even if I prove to be wrong ultimately on that—and it would be an arguable question; certainly, we would argue to the court that it ought to look very carefully before declining to extend the Bivens remedy—even if I were wrong on that and I don't think I am, the very least that can be said is that the situation out there with respect to a Bivens remedy is very murky, very unclear, and that in a matter of this importance, with rights which are this important at stake, Congress ought to create a clear remedy so that everyone knows what the rules are.

So that when lawsuits are brought, they are not protracted litigations which extend over years while the parties on both sides are groping to find what exactly the right issue is and what exactly the remedy that might be available is. Part of the harassing effect of lawsuits on the FBI and its agents is precisely a result of the current confusion over what the state of the law is.

Third, apart from my analysis of Bivens as articulated in *Davis v. Passman*—incidentally, there was dissent in *Davis*. There was an argument by four justices that in the *Davis* situation, which is only the second time Bivens has ever been applied by the Supreme Court, that Bivens should not have been extended in that situation. So that in the second case where Bivens was applied, it was a five-to-four decision which made it very clear that the remedy was limited to the facts of the case.

Beyond my analysis of the problem, the Justice Department has taken the position in a number of pending lawsuits that Bivens does not create a remedy for violations of the first amendment. And the remedy which I have proposed to this committee is precisely a remedy for violations of political and religious freedoms under the first amend-

ment, because those are the freedoms which were most seriously infringed upon by the FBI violations thoroughly documented not only in the Church committee report in the other body, but also by the numerous reports on the House side as well. The most significant violations which need to be addressed by a charter civil remedy are first amendment area violations.

The Supreme Court has not yet and, in my judgment, is not likely to extend Bivens wholesale to first amendment violations.

As to criminal actions, I think the record there speaks for itself. It does not take long, in reading the various congressional reports, to detect numerous apparent instances of indictable offenses committed by FBI agents in the last 30 years. And yet we have not had a single successful prosecution of any FBI agent for any of the numerous instances of misconduct which have been alleged and documented.

And as you know, the one current pending prosecution we do have is in serious jeopardy because of the "Graymail" problem.

As to internal discipline by the FBI, the record is equally bleak. Of the numerous instances of FBI misconduct that have been documented, I am not aware of internal disciplinary action being taken for intelligence violations in any case, other than the New York burglaries case, in which of 70-odd agents who were involved, no more than six were disciplined. And those who were disciplined fought the disciplinary procedures, and I am not familiar with the precise outcome of that contest, but I know that the discipline was resisted.

Finally, with respect to oversight by the Justice Department, the Justice Department neither historically nor necessarily in the future, nor even in the recent past, has it been a model of oversight of the FBI. To cite only one example, the No. 2 official in the FBI retired only this April at a press conference in which FBI Director Webster announced that this individual had been cleared of all charges of misconduct that had been laid against him. This was following a so-called investigation by the Office of Professional Standards of the Justice Department—I'm not sure I have the right title, but it's something along those lines—of allegations against the individual which had been made by a retired FBI agent under oath in our litigation in Chicago.

The retired FBI agent was never deposed under oath concerning those sworn allegations of his. He was never asked specifically about the basis for his sworn allegation of knowing condonation by the No. 2 man in the FBI of extensive burglaries in Chicago. And in a report, incidentally, to Director Webster by his own internal counsel, advising him of the nature of the charges, the specific allegation of the individual's knowledge or condonation of burglaries in Chicago was not even mentioned; so that I am not even certain that Director Webster was even made aware of the allegation, as fine a judge as the Director is.

With that kind of record in the recent past, I don't think we can have a great deal of confidence in the internal enforcement mechanisms of the Justice Department.

I think I probably have answered your question at more length than I ought to.

Mr. EDWARDS. It was a helpful answer.

The charter would give the sanction of Federal law to several investigative procedures or techniques which are constitutionally suspect, for example: searching a man's garbage can, mail covers, consensual monitoring of conversations where one party has given his or her consent, the other party not.

Mr. DRINAN. And the use of informants, Mr. Chairman.

Mr. EDWARDS. And the use of informants. There is a fourth amendment problem, with the use of informants, undoubtedly. Would you prefer not to have those made a part of Federal law and let the courts proceed as they presently are proceeding in those areas of suspect techniques?

Mr. CASSEL. I think I need to look at that on a technique-by-technique basis, Mr. Chairman. In the initial statement I submitted to this committee, I dwelt at some length on the question of infiltration of political groups, because of all the techniques which you mentioned and of all the techniques which the FBI has used which are constitutionally suspect and not blatantly illegal like burglaries, the infiltration of political groups is the most intimidating, the most intrusive, and the most threatening to civil liberties.

I proposed in my testimony that there ought to be a series of standards very narrowly restricting the infiltration of political groups by FBI informers. We have to understand that when these informers infiltrate political groups, they don't simply sit in the back row of a large meeting in a room like this. If this is a political group meeting and the FBI is infiltrating, the infiltrator is sitting up there at the bench and he's one of you.

The FBI makes every effort to insure that its infiltrators penetrate the leadership circles of the groups it infiltrates. For obvious intelligence reasons: the higher up you get, the closer into the private conferences of the leadership you get, the better intelligence you get. And that makes perfect sense when you are investigating a criminal group.

However, when you are investigating a political group, what it means is that the Government is in effect taking over the leadership of a political group—voting on its policy decisions, giving its speeches, writing its newspapers, deciding what it shall do and what it shall not do. And that is the most serious, far-reaching, and—just in terms of sheer numbers—staggering intrusion by Government on the free political process in this country of any of the techniques the FBI uses.

Mr. EDWARDS. The FBI would say they don't do that now, that they are complying with the criminal standard and that all of those domestic intelligence cases have been closed down. They would say that unless there is an actual or suspected violation of Federal law they could not infiltrate a political group.

Mr. CASSEL. Well, there are two responses to that, Mr. Chairman. I think the most important, for our purposes today, is what does the charter permit. The charter proposed by the FBI and introduced into Congress does not contain any special restriction whatsoever on the infiltration of a political group.

Mr. EDWARDS. No; but it establishes the criminal standard in the first section.

Mr. CASSEL. It requires that there be a criminal investigation or a terrorist investigation underway, but once that investigation is underway, there is no effective limitation on what the FBI can do in infiltrating a group. So that if you have a large group, say, a large antiwar

group 10 years ago and you have a few individuals in that group who are committing a crime or suspected of possibly being about to commit one at sometime in the future, the FBI infiltrates the entire group on the grounds of investigating those two individuals and affects the political activities of hundreds, maybe thousands of people because it says it needs to obtain criminal evidence concerning those two individuals.

It is difficult to prohibit the FBI from infiltrating political groups altogether, because there are political groups which get into the area of criminal conduct. What my testimony, therefore, suggests in the lengthy statement I have submitted are some very careful safeguards on that infiltration, careful standards and careful procedures. I wouldn't use the meat-ax approach of an absolute prohibition because I think there are legitimate law enforcement needs here that need to be taken into account.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Coming to the precise point of the inquiry here—namely, the damages that victims should receive, is there anything in your bill about the duty of the FBI to notify the victims that the Justice Department did, in fact, notify certain victims under Attorney General Levi, they drew up a special review committee and they did, in fact, inform the family of Jean Seberg. Would you feel that there is a right in us to know that informants or agents of the FBI did, in fact, infiltrate our organization?

Mr. CASSEL. Specifically, in answer to your question, Representative Drinan, there is nothing specifically in the civil remedy provision which I have drafted that would require the FBI to notify victims. The civil remedy provision I drafted assumes that the victim is aware of some wrongdoing at least enough to file a lawsuit.

Mr. DRINAN. That's not necessarily true.

Mr. CASSEL. It certainly is not, and I think the suggestion you make is a good one and ought to be addressed in the context of what the FBI and the Justice Department ought to do when, during the course of their internal self-policing, they come across evidence of wrongdoing. I think it would be an excellent suggestion to require such evidence—once it reaches a sufficient threshold. I don't think that any mere allegation should be divulged, but once it reaches a threshold of reasonable suspicion—it certainly should be divulged to the victim.

That is not within the scope of the specific proposal I made today.

Mr. DRINAN. Your proposal certainly should be amended to include the right to know. Even the FBI has admitted that there is a right to know, and that here is the standard they use—this is in their letter from Mr. Webster to the chairman on the date of September 26 of this year—he said, notification was made in those instances where the specific Cointelpro activity was improper, where actual harm may have occurred, and where the persons were not already aware that they were entitled to Cointelpro activities. The Justice Department notified Miss Seberg that she had been a target.

Mr. CASSEL. I would certainly agree that that kind of provision ought to be put in the charter. I simply was trying to be very specific in what I was doing and didn't reach that, but I think it is a good idea.

Mr. DRINAN. I take it that you include informants along with the agents and that a right of action could be maintained by the injured person against an informant?

Mr. CASSEL. That reaches a technical issue under the bill, and it is an excellent point. I have drafted a civil remedy which would create a civil cause of action against any employee or agent of the FBI, in fact, of the Department of Justice who is involved in activity governed by the FBI Charter. The FBI has taken the position that its informers, private citizens whom it pays to inform for it, are neither employees nor agents of the FBI, for purposes of the FBI's own internal policies.

However, my interpretation of the common law of agency is that someone who is paid by a Government agency, who is directed by it to perform a mission for it is an agent at common law. Therefore, I would argue that the bill I have drafted would include informer. But I think to avoid any question, that the legislative history ought to make clear that it is intended that paid informers, at the very least, be included within the provisions of the bill.

You do run into a problem when you talk about citizens who volunteer information on a nonremunerated basis being subjected to lawsuits for having done so. That might discourage people from volunteering information to the FBI. I'm sure that the FBI would vigorously object to having, say, the security director at Sears, Roebuck or the president of a bank or John Q. Citizen who volunteers a complaint to the FBI, thereby subjecting himself to civil liability under a remedy. So I think you need to look carefully at excluding those people; but paid, full-time informers of the FBI should be included.

Mr. DRINAN. Well, look at this though, that suppose we had some volunteer American students infiltrating Iranian organizations, they don't get paid, yet they do a good deal of damage. They infiltrate, they might even take over. They might seek to alter the course of the decisions of this Iranian student body. Should they be immune?

Mr. CASSEL. Not if they are doing so at the direction of the FBI.

Mr. DRINAN. They are volunteers. They are not paid for this.

Mr. CASSEL. I think that's a serious problem you have raised in terms of the law dealing with it, but I am not sure that a civil remedy directed against the FBI for violating its charter would appropriately create a cause of action against private citizens who are not acting pursuant to the direction or at the request of the FBI.

Mr. DRINAN. There could be an agency that would be ratified, and they would volunteer to the FBI, and the FBI says—We will welcome any information that you will give to us.

Mr. CASSEL. I would agree with that. That would fall, again, within the definition of agent at common law. I am suggesting that the legislative history to a civil remedy should make clear that the use of the word "agent" in a civil remedy includes an agent at common law and not merely an agent as the FBI narrowly defines it.

Mr. DRINAN. I thank you for your excellent work, and I know that you will keep in touch with the committee with all types of scholarship that you are so good at.

Thank you very much.

Mr. EDWARDS. Ms. LeRoy?

Ms. LEROY. Mr. Cassel, are there lawsuits against the FBI for the alleged illegal activities of its informants?

Mr. CASSEL. Yes. Allegations concerning the alleged illegal actions of informants for the FBI, and principally, infiltrators for the FBI have been brought in the Chicago litigation [the two class actions in Chicago are *ACLU v. City of Chicago et al.*, in which the FBI and

various Justice Department officials are defendants, and *Alliance to End Repression v. DiLeonardi et al.*, a Chicago class action]; in the Socialist Workers Party lawsuit in New York; and in a number of other instances.

Ms. LEROY. Has that issue been decided?

Mr. CASSEL. The issue has not been decided on the merits. We are still at the very difficult discovery issue of the informer's privilege. As you know, the Socialist Workers Party, in an effort to prove that there was misconduct by the FBI infiltrators in the party, sought to obtain the files not on the 1,300 FBI infiltrators who had infiltrated the party, but just on a selection of 18 of them.

The district judge in New York ordered the Justice Department to turn over the files, and the Justice Department refused to do so. The Attorney General was held in contempt and the court of appeals lifted the contempt citation but not the underlying order.

As a result, there have been no disclosures of the files in the New York suit. I won't go into the details, but a similar series of discovery rulings has occurred in the Chicago suit. Right now, both the New York and Chicago litigation are at the stage where we are receiving FBI prepared summaries of informer files which do not specifically identify the informers and do not provide any information which would specifically identify them.

For example, if there was an infiltrator in the ACLU in Chicago who became its treasurer, as a result of which, during the next few years the ACLU lost revenue, we would have no possible way of knowing that in our lawsuit, because we are not being told that the informer was in the ACLU or that he was treasurer of the ACLU because the FBI says that would tend to identify the person.

Because of that problem, we have not been able to reach the merits yet. I expect the merits will be reached in the coming years in both the New York and the Chicago lawsuits, but that does raise the very important question, addressed in my initial written statement, of the Justice Department's attempt to legislate into the charter an absolute prohibition on the disclosure of any informer files.

There is a section in the charter which would, in effect, win for the FBI what it has been unable to win either in the Chicago or New York lawsuits definitively, and which would prohibit any court from ordering any disclosure of anything that would identify an informer. Our position is that that provision ought to be deleted entirely from the charter, and the matter ought to be left to the courts who, to date, have certainly been as sensitive as the Government could possibly ask to its needs for confidentiality.

Ms. LEROY. What impact would inclusion of that provision have on the lawsuits that you are talking about in terms of civil remedies, if it were to stay in the charter?

Mr. CASSEL. First of all, it would mean that issues that are pending before the court in Chicago would be decided by the Congress. The judge is now looking at the issue, and the FBI is simply attempting to deprive the judge of jurisdiction over the issue in the middle of his consideration of it.

Second, it would tie his hands. It would mean that we could not obtain disclosure of any files concerning informers that would identify them. And it would mean that it would be impossible to prove the kinds of injuries that resulted to civil liberties and to economic inter-

ests from the FBI's infiltration of political groups. We simply could not prove it, because the evidence would become permanently secret under that provision of the charter.

That's why it is so important, and that's why the Government's labeling of that provision as a so-called "technical" amendment at the end of the charter, as if it had no real significance, is a very unfortunate way to include such an important change in the law in a charter.

Ms. LEROY. One of the arguments that has been made against inclusion of a civil remedy in the charter which would provide for individual liability, is that individual liability would tend to dampen vigorous pursuit of an individual officer's responsibilities. Do you have any knowledge that, that may have happened in State and local law enforcement officers as a result of 1983, 241 and 242? Has there been an impact as a result of *Bivens* on Federal law enforcement agents?

Mr. CASSEL. I think that's a legitimate and a valid argument. I think a cause of action with no restrictions whatsoever and with no good faith defense would intimidate law enforcement officers from carrying out their duties as they should. I think it is the case that the Chicago Police Department, for example, has in some cases refrained in recent years from investigations that might have been and perhaps should have been undertaken because of fear of liability and our lawsuit and other lawsuits.

Now, that's a significant concession, obviously, for me to make, since I am representing the plaintiffs in the lawsuits, but I think what we're talking about here is considerations of public policy and I am trying to be nonpartisan about it.

I think it is a legitimate concern, but the response to that legitimate concern is not to throw out the baby with the bath water, not to prohibit any remedy whatsoever, but to build safeguards into the remedy to make sure that it will not unduly deter law enforcement officials from doing their job, to put in a good faith defense, to put in the other safeguards that are included in the provision which I have presented to the committee, including no liability for mere technical violations, no liability for violations that don't affect political or religious freedoms, and attorneys' fees to be awarded against plaintiffs who file frivolous actions in bad faith for purposes of harassment.

So, it seems to me, it is a legitimate concern, but the way we deal with it is the way that other statutes and courts interpreting other statutes have dealt with it, to put in these safeguards and not deprive citizens of any remedy whatsoever when there is a clear violation of their rights.

Ms. LEROY. The charter, as it is written now, not only contains no civil remedies, there are expressed disclaimers—as I am sure you know—that nothing in the charter gives rise to a cause of action or a motion for suppression of evidence, and so forth.

If those sections in the charter stay within the charter once it is enacted, what do you think that would do in terms of the courts' attitude toward review of law enforcement activity?

Mr. CASSEL. Well, first of all, it would retain the existing heavy burden on the court of attempting to decide the very difficult question of balancing the civil liberties and law enforcement interests in the context of FBI surveillance of political groups. That question is not now clearly resolved by any decision or by any law. The Federal judge in our suit in Chicago has to, in effect, decide the FBI Charter

under the Constitution for himself; because of that, the discovery in the lawsuit is going to be continuing for additional years. When the judge gets to the decision he will have a very difficult decision to make. It will take him a long time to do it. I am certain that there is not a Federal judge on the bench today who would not welcome clear guidance from the Congress as to what the FBI can and cannot do.

I think judges would be very frustrated by the Congress finally creating a clear set of rules and then saying, well, judges can't look at these rules. You judges are still out there in the dark, and you have to make up your own rules from scratch by interpreting the very general language of the constitution in a very difficult situation.

I think that the judiciary would very much desire clear guidance from the Congress, and that clear guidance, if permitted to be incorporated in a remedy, would shorten greatly the lawsuits which have been brought, would decrease the number of suits which have been brought on a questionable basis, and would increase the number of suits which have not been brought but which should have been brought because the lawyers were unclear as to what the law was and, therefore, knew they were facing a lengthy litigation that would cost more than the client could afford.

Mr. EDWARDS. If Counsel will yield, I'm sure that the judges would like us to do that, but I am not at all sure that the judges would like what would be the legislative outcome of our efforts to that.

Mr. CASSEL. The judges would not be bound in interpreting the constitution by what the Congress decided to put in a statute, but they would at least have some guidance as to the congressional judgment when they interpret the first amendment which they must do independently, regardless of whatever Congress says. At least they would have the guidance of the Congress in the form of a statute to help them out. So a statute would not bind the judge's hand. If he decided that something was a first amendment violation that was not prohibited in the charter, the judge would be free to go ahead and so find. At least he would have a clearly defined set of rules expressing the view of Congress.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. Thank you, Mr. Chairman.

It has been said earlier and suggested that the FBI should not be singled out for these remedies, that section 1983 and section 241 and 242 generally should be broadened to include the Federal Government generally, incorporating, of course, the good faith defense, and that the charter should not be the place for civil remedies. How do you respond to that?

Mr. CASSEL. I think, in theory, it would be a good idea to write, in effect, a 1983 provision that would cover all Federal Government agencies, but I think as a matter of political realism, that would arouse massive opposition from other Federal agencies, comparable to that which the FBI has already raised concerning its own provision, and would take additional years to complete because the objections that would be raised on an agency-by-agency basis would have to be considered and I think properly.

I think consequently, while that is in theory a good idea, it is speculative at best. It is going to be very time consuming. We are faced now with a clear record of unparalleled violations by a single agency with a legislative charter directed to a single agency. And I think, there-

fore, it makes good sense to create a remedy for that charter directed to that agency at this time rather than wait for something which may never come on the distant horizon of the future that would cover every agency in Government.

I think, frankly, that that argument has been raised, by some people at least, not in a good faith effort to have a remedy imposed governmentwide, but simply as a way to stall and put off having any remedy at all. I realize that there is a good faith and legitimate argument for it in theory. In fact, I would agree with that argument in theory; but as a practical matter, I think that's being used as a stall device.

Mr. BOYD. I have no further questions.

Ms. LEROY. What about the proposed Federal Tort Claims Act amendments? Are you familiar with that legislation?

Mr. CASSEL. I am not intimately familiar with the testimony and the drafts of the Federal tort claims amendments, but they do have a number of problems. First of all: The Federal Tort Claims Act involves, in my understanding, exclusively monetary awards to persons who have been injured. But equally important in a civil remedy are an injunctive cause of action and a declaratory cause of action which enable citizens and the courts to engage in external review of the FBI's transgressions. That would not be available under the Federal Tort Claims Act in the form of injunctive or declaratory relief. That's a significant limitation.

Second: As I understand the current drafts of the Tort Claims Act as I have read about them, they refer to constitutional torts without, again, incorporating the many important statutory safeguards in this charter which do not rise to the level of constitutional violation, so that gap would remain.

Third: The problem in the Federal Tort Claims Act is the same as the problem I mentioned in response to counsel's question a moment ago which is that it is a very risky proposition, I think, to assume that the Tort Claims Act amendments will pass at all and rely on that as the remedy for a charter when you are passing a charter.

If the Federal Tort Claims Act amendments had already passed, that would be something else. But their passage is speculative, and at best, in the future. I don't think that sufficiently protects the constitutional rights of Americans affected by the charter nor sufficiently instills public confidence in the efforts of the Congress to reform the FBI.

Ms. LEROY. If the key to civil remedies in the charter is deterrence more than compensation, which I think is what you have been saying, how does holding an individual liable and then having the Government indemnify him, which is usually what happens under the Federal Tort Claims Act, deter that individual? How do you accomplish deterrence of the individual's behavior under those circumstances?

Mr. CASSEL. Well, first, I am not suggesting that deterrence is more important than compensation. I think they are both important and both need to be served by any civil remedy. As to the impact of indemnification on the issue of deterrence, I think that turns on the precise drafting of an indemnification provision and the certainty which an FBI agent would have that he would be indemnified.

If it were clear that no matter how outrageous the FBI agent's conduct, he could be indemnified, I think the deterrent impact of a civil remedy would be quite limited because the FBI agent would know that there would be no way that he could lose.

Quite frankly, if the indemnification provision is qualified and less than absolute, I think as a practical matter there would remain a deterrent effect on FBI agents and officials, because no one likes to be sued and, particularly, no one likes to be sued with an expectation of being found liable even if he may be indemnified at some point in the future. That has an impact on your reputation, it has an impact on your career perhaps. And I think there would remain some deterrent impact, although certainly not the same as if there is no indemnification. Without having seen the precise indemnification provision, I would not blanketly condemn indemnification.

Ms. LEROY. I have no further questions. Thank you.

Mr. EDWARDS. Where the Government is a defendant in some of these lawsuits, does not it seem to you from time to time—perhaps most of the time—that they are very stubborn in their defense, and that they know, the Government knows, representing the people, being the people, that their behavior in a lot of these cases has been very bad, that people's rights have been trampled on. And yet, in in these lawsuits, they will fight for years and years and spend hundreds of thousands of dollars in Government money, public money, in fighting these lawsuits.

Do they, from time to time, make an effort to get rid of the suits by coming to you people and saying, We really screwed it up; we want to settle it?

Mr. CASSEL. I am not familiar with every major surveillance litigation in the country, but you have accurately characterized every civil litigation with which I am familiar; I am familiar with about 50 of them.

In particular, in our lawsuit, the Government has fought tooth and nail every request for discovery in the early stages, until the court finally became fed up and made it clear to the Government that it would no longer tolerate that. Every procedural issue, every legal issue, the Government has resisted vigorously in the face of a clear showing of violations of rights such as those set forth in the Church committee report.

At one point, a Justice Department attorney and an FBI attorney had to be held in contempt of court by the Federal judge in Chicago in order to have them comply with his discovery orders. During all this time, we have made it perfectly clear to the Government that we are not litigating for the sake of litigating. We get no particular joy out of diverting BPI's resources from the many other lawsuits that we think need to be brought into a years-long massive litigation against the FBI.

We have, in writing, most recently in the summer of 1978, made a proposal to the Government that we certainly ought to be able to sit down as reasonable people and attempt to agree that what happened in the past was wrong, to the extent it was, and that there ought to be a remedy for it. The Government has never answered that letter. They have totally stonewalled any overture on our part to settle the litigation. And that is characteristic of their conduct of every other civil litigation which I am familiar.

There are lots of reasons for it, but the fact is, as you suggest, that the current Justice Department, and I think Attorney General Bell's tenure—I don't know whether it will change under Attorney General Civiletti because I don't know of any issues that have come up since

August, but he has certainly not changed, to my knowledge, the prior policy of Attorney General Bell which was, to judge by its results, to vigorously oppose all these lawsuits.

It is very disappointing. I frankly had hoped for better from the Justice Department.

Mr. EDWARDS. Well, I suppose you have the bureaucracy that goes on regardless of who is the Attorney General or who is the President. This is what they have been doing for generations. They feel it is their obligation as lawyers to put up every defense. Do you think that's the way they figure, or are they not getting different directions from the top?

Mr. CASSEL. I think it's partly the lawyer's instinct to fight even when he shouldn't. I have tried to resist that instinct in my testimony today on a couple of occasions for which I will undoubtedly take heat from my clients when I get back home. But, I think it is more than that.

I think we saw some early indication under Attorney General Bell of a phenomenon which is inherent in the Justice Department, and that is when he initially brought the indictment of Mr. Kearney, there was a massive outcry by FBI agents. He was grilled at meetings of FBI agents in Indianapolis and elsewhere. He had letters. He had delegations visiting him. There was a tremendous amount of pressure on him from the FBI to recognize their interests, and there was not comparable access on the part of citizens with countervailing interests, the victims of this FBI conduct, to the Attorney General personally.

We have attempted in our lawsuit, for example, to communicate or to meet with high Justice Department officials in this connection, and we can't get past the lawyers in the front office. And we are quite respectable citizens and pillars of the community compared to many of the victims of the FBI's transgressions who have no opportunity whatsoever to have any significant communication with high government officials. So there is constantly pressure on the FBI Director, on the Attorney General, and on high officials in both the Bureau and the Department from the ranks below. That's one of the reasons why we simply can't rely on anyone's good faith for the Department or the Bureau to police itself.

It's one of the reasons why you have to have citizens' suits available in Federal courts so that some outsider, a Federal judge who is not directly subject to that kind of pressure from his agency can take a dispassionate look at the facts and the law and rule accordingly. This charter would not permit that to occur.

Mr. EDWARDS. Well, even though it is not the subject of this hearing, I think we would like you to think about that in the future, because perhaps next year we will take a look at that subject ourselves. This subcommittee, over the past few years, has been instrumental, as part of the process that has helped the FBI get out of a number of areas that they were in where they were spending a lot of time and money violating the rights of people. They don't do those things anymore to any great extent—namely, in domestic intelligence where their efforts were massive just a few years ago. Around 20 to 30 percent of their time, I'm sure, must have been spent on just keeping files on organizations and American citizens who had radical political beliefs or religious beliefs of one kind or another.

In other areas, we are in all sincerity trying to assist them, and with their cooperation much of the time, in doing a better job—for example, in their communication system, in their recordkeeping on criminal records for the entire U.S. police establishment. We are going to try to help them decentralize those records and let them stay back home where they belong, with the FBI only doing the necessary work to let communications take place between different police agencies in different parts of the country. Those criminal records at FBI headquarters are all duplicates or most of them are duplicates of criminal records back home.

This is an important area, and this also has to do with the Department of Justice, because not only the FBI is involved in this type of activity where once they get started in defending a lawsuit where there is serious misbehavior or frivolous misbehavior on the part of Government agents, then they make it as tough as possible for justice to be done. In the meantime, they spend a lot of the taxpayers' money. I think we would like to look into it, and I think we could be of help and you could be of help to assist them in doing a better job.

Mr. CASSEL. I agree with that, Chairman Edwards. There is one precedent where I think Attorney General Bell deserves credit. There are many areas where I think he deserves credit, but in this particular area, there is at least one precedent that I think is quite commendable wherein, I believe it was in approximately the spring of 1978—it may have been even earlier—he issued a policy statement that the Justice Department, in processing Freedom of Information Act requests, was not to unnecessarily object to requests merely because some argument might be made.

And I think that has had an impact on disclosure under the Freedom of Information Act by the Department of Justice, and I think similar steps could be taken with respect to civil litigation.

With respect to the substantive conduct of the FBI, it is indeed true that there have been enormous improvements. I would hope that the kind of internal improvements that have occurred in that area could also take place with respect to the Justice Department's defense of civil litigation. But as you stated at the outset today, here Congress is legislating not just for today but for tomorrow. And tomorrow can be a long way off, and it is important that we not allow the commendable improvements under Director Webster, with all the credit they deserve, to prevent the enactment of a charter that will govern the FBI effectively with an effective civil remedy for decades to come.

As I am sure you are aware, there was another Director Webster, there was another Attorney General Levi 50 years ago, when Attorney General Harlan Stone in 1924, I believe, essentially said, on the basis of a similar record of FBI political surveillance, get out of the political spying business, focus on criminals. J. Edgar Hoover agreed, and that was done administratively. But there was never any law passed, and as a result, a few years later, when another administration changed its mind on that, the FBI got back into the business.

We should not let that historical cycle recur. That's why it is so important that a charter be passed, fully, crediting the administration of the Attorney General and the FBI Director for those improvements which have been made.

But also I would suggest that side is a little risky to presume that they have entirely erased all the questionable practices of the past.

The internal investigation that I mentioned earlier in my testimony concerning the departed No. 2 official of the FBI gives me very serious pause about believing that the Justice Department still does not have a lot of room for improvement in its internal self-policing of FBI misconduct.

Mr. EDWARDS. It has become increasingly apparent to the members of this subcommittee and I believe to our counterparts in the Senate that this bill is an omnibus bill, and it includes so much that changes so many laws, makes so many new laws, that it might be difficult to enact when—well, in Seattle, for example, the Seattle Police Department has a much simpler law, an ordinance that just forbids the Seattle Police Department to investigate in these sensitive first amendment, constitutionally protected areas of religion and whatever and then puts certain penalties on investigations where that is the sole purpose of the investigation and then provides an independent auditor appointed by the mayor to keep tabs on what the police organization is doing.

That's much simpler than this particular charter that the FBI has written and given to us to look at. This is a very broad charter.

Mr. CASSEL. I am familiar with the Seattle ordinance. I submitted lengthy written technical testimony on that ordinance as well. I infer, in part, from your remarks, a concern that this whole approach represented by the omnibus bill has so many problems that perhaps we ought to scrap it and start over with a narrower approach, perhaps that of the Seattle bill, perhaps that of some other bill.

Frankly, I am concerned that that decision not yet be made. It seems to me we finally have a bill introduced into Congress, one which the FBI and the Department and the President support, one which has the support of both the chairman and the ranking minority member of the relevant Senate committee. It seems to me that it is important not to let the opportunity presented by this bill—to meaningfully reform the FBI by legislative means—slip through our hands simply because we might have done it otherwise if we had started the process.

As the memories of Watergate, of Cointelpro, of Jean Seberg, Martin Luther King—I could go on—as the memories of all those hideous violations of the rights of Americans fade from memory, as we go further and further from the public sensitivity to the problems that can be created by giving the FBI an unlimited leash, there is a danger that no effective bill might be passed in future years.

I think, therefore, it is important for civil liberties groups, for groups which are concerned about this sort of thing such as BPI to look at this charter very carefully, to try to bring your attention to what we think are the principal problems with it, and to attempt to get the necessary amendments made. If those necessary amendments are made, concerning Cointelpro, concerning civil remedy, concerning standards for infiltration, and one or two other key areas, then I think it might well be advisable to attempt to support this bill in the coming legislative year.

To oppose it at this point or to reject the whole approach, I think risks no bill at all. And that leaves us where we are now with administrative regulations by the executive branch which can be repealed at any time and with no effective civil remedy in court under Bivens now and probably none in the foreseeable future under Bivens.

I realize that's a very difficult political judgment to make, and I don't purport to know the right answer. I'm just giving you my viewpoint of the reason why BPI has taken the time we have to look very closely at this bill rather than just simply saying that we think the approach is not the best and opposing it from the outset.

Mr. EDWARDS. Well, we are certainly not giving up. We are going to work very hard in enacting a charter. I think that your organization and many respectable hard-hitting organizations concerned with civil liberties would testify that without the amendments that you have in mind, the present law protects the public more than the charter would.

Mr. CASSEL. We have delicately avoided pronouncing our position on that issue up to this point, because we think it's important not to pressure the coalition of support which has been built for the principle of reform and the principle of a charter into dissolution. I think I ought not to explicitly reply to that, because if I did, I would be exceeding my authority as attorney for a number of groups. We have made a decision that we will not publicly take a position on that question until we have pressed as hard as we can for amendments.

Once the committee process is completed in the Senate and in the House and we see what we have then, we will be in a position to be very clear about whether we are for or against the resulting product. At this point, we have made the judgment that it is premature for us to pass judgment on a bill which we hope will be improved. But there are certainly very, very serious problems with this bill and threats to civil liberties in its present form.

Mr. EDWARDS. I appreciate that.

Counsel?

Ms. LEROY. I have no further questions.

Mr. EDWARDS. We appreciate your testimony very much today. It has been very helpful, and the excellent work you did in the material you sent to us, of course, will be made a part of the record and will be of immense assistance to the committee and to the House and to the Congress. Thank you very much, Mr. Cassel.

Mr. CASSEL. Thank you very much for your time and your courtesy, Mr. Chairman, and committee counsel.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]



# LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, DECEMBER 6, 1979

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 2226, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Drinan, Hyde, and Sensenbrenner

Also present: Catherine A. LeRoy, counsel, and Thomas M. Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee continues its hearings on H.R. 5030, the proposed legislative charter for the Federal Bureau of Investigation.

We will be concluding the discussion we began several weeks ago on a question that goes to the heart of the charter, how can we assure that both the letter and the spirit of the charter will be complied with once it has been enacted.

To adopt the most stringent standards and requirements to govern FBI activity means very little if there is no way for the FBI Director, the Attorney General or the Congress to find out if these standards had been adhered to and if we cannot assure ourselves that the charter is being complied with, then we will have accomplished very little in enacting it.

I believe that the best way to assure accountability is to establish a variety of mechanisms of internal as well as external review and control. Some mechanisms already exist. Additional alternatives have been suggested to us in previous hearings. Today we will hear still more suggestions.

Our first witnesses today are from the association of the bar of the city of New York. The association, through its Committee on Federal Legislation, has had a longstanding interest in the FBI charter.

In 1977 the committee issued a report entitled "Legislative Control of the FBI," which contained legislative proposals which the committee felt were essential to the FBI Charter.

Included in the committee's recommendations was a provision for civil remedies. Since then, the committee has been analyzing H.R. 5030 and presently will issue a comprehensive report on legislation before us.

In the meantime, two representatives from the association are here with us to share their views on the issues of enforceability and accountability.

We are very pleased to have with us the president of the association, Mr. Merrell E. Clark, Jr. Mr. Clark is a partner in the firm of Winthrop, Stimson, Putnam, and Roberts. With him is Ms. Kathleen Imholz, chair of the committee's subcommittee on the FBI Charter, as well as a partner in the firm of Conboy, Hewitt, O'Brien, and Boardman.

You are both welcome. Before you proceed, I recognize the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

I just want to take this occasion to thank the Association of the Bar of the City of New York for all they have done to assist the Congress. In my previous incarnation I was a member of that distinguished association, although I resided in Massachusetts. I have followed all of your work with the greatest of interest and profit.

May I thank you particularly for the work that you have done in connection with the recodification of the criminal law. In another subcommittee I have a good deal to do with that. I want to thank you for the report on the FBI 2 years ago and commend you upon the testimony that we are honored to have today.

Thank you very much.

Mr. EDWARDS. The gentleman from Illinois?

Mr. HYDE. I have no statement other than to associate myself with the remarks of the chairman.

Mr. EDWARDS. Thank you.

You may proceed.

**TESTIMONY OF MERRELL E. CLARK, JR., PRESIDENT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ACCOMPANIED BY KATHLEEN IMHOLZ (CONBOY, HEWITT, O'BRIEN, AND BOARDMAN), NEW YORK CITY, N.Y.**

Mr. CLARK. Thank you, Mr. Chairman.

Distinguished members and staff of this important subcommittee, our association has 12,000 members. It is the oldest bar association in the United States. On behalf of the association, I wish to express our gratitude for the opportunity to appear here and express our views to you today.

I am here for the principal purpose of introducing Kathleen Imholz to the subcommittee. Her subcommittee of our Committee on Federal Legislation has been immersed in a study of the FBI Charter and of the Federal Tort Claims Act for a period of over 2 years.

She is a very distinguished member of the bar of the State of New York, and as the chairman has said, a partner of the firm of Conboy, Hewitt, O'Brien, and Boardman of New York City.

I am also here to emphasize the deep concern of our association that there be adequate civil remedies for persons injured by violations of the prohibitions of the FBI Charter.

Respect for law is essential to democratic government. To obtain that respect, the law must deserve respect.

A law which properly identifies and prohibits reprehensive acts by the Government, but which does not provide compensation for citizens injured by such acts, invites disrespect. It appears to be a charade or, in the current jargon, a catch-22.

With your permission, I will ask Kathleen Imholz to present a statement on behalf of our association.

Thank you.

Mr. EDWARDS. Thank you, Mr. Clark.

Ms. Imholz, you are recognized.

Ms. IMHOLZ. Thank you very much, Mr. Chairman, staff, and members of the subcommittee for all of your kinds words.

I am very pleased to be here today because, as the chairman stated, we have been very interested in legislation of this sort for some time, beginning with the report that we issued 2 years ago.

We have been looking to the Congress with great interest ever since, hoping to see the kind of legislation that has finally been introduced.

We recognize that it is going to be a model for law enforcement legislation all over the country, at the municipal and the State level also.

That is why we think it is vitally important that the principles that are established in this legislation should be the best possible.

I would like to say, although my statement is directed to civil remedies—and I will limit my remarks today to that—I agree completely with what the chairman said about the necessity for a variety of different sanctions.

I think the provision in the charter requiring the Director to “establish an effective system for imposing administrative sanctions for failure to comply with the provisions of this chapter and guidelines and procedures adopted pursuant to this chapter,” section 532(b)(3), is very important.

If in fact it can be carried out it will be almost a first in administrative law. To date there hasn’t been an effective administrative control on conduct of this sort. None of the internal reviewing bodies have really directed their attention to conduct by their employees that violates constitutional rights or personal rights.

This, I think, is one of the problems with the proposed amendments to the Federal Tort Claims Act. The administrative system is not well developed to handle this kind of conduct. I hope that it will be in the future, and I think a provision like this is very important.

We also think that the FBI Charter, just as the Foreign Intelligence Surveillance Act, the Privacy Act, the Right to Financial Privacy Act of last year, and a number of other recent statutes, should specifically spell out a civil cause of action for violations.

This should include a right to actual damages, right to injunctive relief when appropriate, attorneys’ fees, and liquidated damages in appropriate cases.

The amount of time that is spent in litigation as to whether there is a private right of action under various statutes is a waste of everybody’s time. It would be better for the Government, it would be better for the employees, and it would be better for individual American citizens if this is clearly spelled out.

In those recent statutes where it has been clearly spelled out, there has been no flood of litigation. There isn’t any reason that we can see why there shouldn’t be specific remedies for specific statutory violations of the charter.

If it is important enough to spell out these principles, it is important to have a remedy for them.

Now, we know it has been suggested that present law is adequate to provide a remedy, but we really don’t think that is the case.

The doctrine of the *Bivens* case, the 1971 case in which a private right of action for damages was given to a person for fourth amendment violations, resulted from the fact that there was no enabling legislation like section 1983 of title 42, which is available in certain situations for people injured by State or local government officials.

The development of case law since *Bivens* has been very erratic. People have spent many years arguing whether something is or is not compensable under *Bivens*. We don't think that the case law following that case is really adequate to deal with the kinds of problems that we are discussing here.

We will recommend in our report on the Federal Tort Claims Act, which we will be issuing shortly, that rather than amend that statute, there should be a statute similar to section 1983 for Federal Government employees.

We don't think that in any event that would be adequate for the charter.

Many of the things that are covered in the charter are not necessarily constitutional violations. The pen register technique, for example, has just been held by the Supreme Court not to be covered by the fourth amendment.

Yet, it is clearly stated in the charter that there are to be standards for the use of that technique, and it does invade the rights of citizens to have that technique used. If it is misused, we think that there should be a clear remedy for that in this charter.

That is the position that our association and my committee, the Committee on Federal Legislation, has urged in a number of situations. This concept is in the Foreign Intelligence Surveillance Act, and it should be in this charter also.

I would be glad to answer any questions. Thank you.

MR. EDWARDS. Thank you very much, Ms. Imholz.

Without objection, the entire statement, which is excellent, will be made a part of the record.

[The information follows:]

THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK,  
*New York, October 30, 1979*

STATEMENT OF KATHLEEN A. IMHOLZ ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK—CIVIL REMEDIES IN THE FEDERAL BUREAU OF INVESTIGATION CHARTER ACT OF 1979 (H.R. 5030)

The Committee on Federal Legislation of The Association of the Bar of the City of New York is charged with the responsibility of developing and presenting the views of The Association on proposed federal legislation of a diverse nature, and I am particularly pleased to have the opportunity to testify today on the Committee's behalf in connection with an issue in which we have a long-standing interest—the civil remedies that should be available to persons injured by government conduct, in this case, conduct in violation of the proposed charter governing the activities of the Federal Bureau of Investigation.

Our full Committee has not yet had an opportunity to discuss the current charter legislation or to reach any final determinations on it. However, in 1977, following the final report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), the Committee on Federal Legislation issued a detailed report entitled "Legislative Control of the F.B.I.," in which we urged that Congress enact a comprehensive charter for the Federal Bureau of Investigation and discussed the features we thought that charter should contain. We have made this report available to the staff and members of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, and I respectfully request that it be entered in the record of these hearings, to accompany my testimony. Reference is in particular made to Section III F. on Remedies and Sanctions.

We are in the process of preparing a report entitled "A Remedy for the Deprivation of Constitutional Rights by Federal Officers and Employees: Proposed Amendments to the Federal Tort Claims Act", initial drafts of which have been discussed by our full Committee. This report will discuss S. 695 and H.R. 2659, introduced in Congress in March of this year, which would provide an exclusive remedy against the United States for the acts and omissions of its employees, including their so-called "constitutional torts". It will deal with many of the issues before the Subcommittee today. Copies of this report and a further report we are preparing on the present charter legislation will be furnished promptly when available.

In our 1977 report, and in many others that the Committee on Federal Legislation has prepared, we have stressed the principles of appropriate remedies and accountability, which go hand in hand. We are pleased that the monumental job of drafting comprehensive FBI charter legislation has proceeded as far as it has, and some of the general principles espoused in that legislation, such as minimal intrusion and investigation of only criminal conduct, are entirely salutary and in accordance with the constitutional traditions of this country. But when we look for the remedies that will help to insure that these principles are carried into effect, we do not see them yet.

A structure of remedies is fundamental to any statutory scheme. Congress has recognized this many times, and such statutes as the Privacy Act, 5 U.S.C. § 552a, and the Foreign Intelligence Surveillance Act of 1978 contain detailed provisions for civil and criminal penalties, tailored to the specific areas of concern of each statute. It has been suggested by representatives of the Justice Department in hearings held to date on the F.B.I. charter that present law, combined with administrative sanctions, is adequate to supply the needed remedies. We do not believe this is the case.

Congress saw fit, after the Civil War, to enact a number of civil rights statutes providing civil and criminal remedies to persons deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States under color of state law (this language is from the civil statute now codified as 42 U.S.C. § 1983). This legislation has been used in the past twenty years in many cases involving state and local law enforcement officers. It has generally been held to provide remedies not against governmental entities but only against the officers. (However, the law is in a state of flux on this point; see e.g. *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978).) There has never been a comparable statute for violations of this nature by the United States or its employees. This led in 1971 to the Supreme Court decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 288, that a federal damage action was available against the agents for Fourth Amendment violations despite the absence of enabling legislation. The doctrine of the *Bivens* case has undergone a slow development in this decade. The United States became a potential defendant in 1974 by reason of a limited amendment to the Federal Tort Claims Act that waived its sovereign immunity for certain intentional torts of its law enforcement or investigative officers.

This patchwork has never been satisfactory. The Federal Tort Claims Act, primarily designed as a negligence statute, is tied to state law torts. Immunities such as the "good faith" defense further cloud the issue. Most important, it is far from clear what conduct by government employees amounts to the deprivation of a "constitutional right". For all these reasons, there have been few individual recoveries despite the wide scale revelations of misconduct by the F.B.I. and other agencies that came out of the work of the Church Committee and other congressional committees and Freedom of Information Act disclosures. Many of the lawsuits that have been brought have gone on for years without resolution.

The proposed amendments to the Federal Tort Claims Act would improve this situation in some respects, although we believe they have defects, which will be addressed in our forthcoming report. There are, however, two important problems that would remain even if that legislation were enacted. First, there is no clarification of what conduct amounts to a constitutional violation. The Justice Department stated in its section-by-section analysis of S. 695 that:

"It is not contemplated that every unconstitutional act necessarily will rise to the level of a constitutional tort. The bill makes no attempt to define the breadth or scope of those rights or constitutional deprivations which are compensable under a *Bivens* theory. Rather, that is left to the developing case law."

To date, the Department has argued in many of these cases that egregious conduct, such as some of that arising out of the infamous Cointelpro programs, does not rise to that level.

More importantly, perhaps, it need not matter whether the violation of a federal statute is or is not also a constitutional violation. As we urged in our 1977 F.B.I. report and in our testimony on the Foreign Intelligence Surveillance Act, the intentional breach by a federal employee of a statutory mandate should, in most cases, give an independent right of recovery to the injured party. To provide for this on a government-wide basis by a single statute is probably not advisable, at least not without careful study of all its implications. But individual statutes, and in particular the F.B.I. charter, which touches such sensitive areas, must specifically contain these remedies.

In our 1977 report, we supported the recommendation of the Church Committee that both the government and the individual agents should be potentially liable for damages for the violation of a statute governing F.B.I. activities. We felt, however, that recovery against the agents themselves would be unnecessary in most cases, unless the plaintiff could prove that the agent acted willfully, maliciously, with gross disregard for the victim, or with some similar standard of culpability.

We did not agree with the limitation on the remedy provisions proposed by the Church Committee to "substantial and specific" claims. Issues of specificity are best dealt with on a case-by-case basis, using traditional (or statutory) "standing" concepts. As to the "substantial" limitation, we noted that it is susceptible to being read to require substantial monetary damage, which is often not the case with violations of statutes such as this and does not bear a relationship to the seriousness of the violation. We stated, and continue to believe, that a minimum statutory civil damage award should be available; it should also include punitive damages, injunctive and other equitable relief, and recovery of attorney's fees and other costs of litigation. A similar approach has been followed by Congress in numerous recent statutes such as the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act of 1978; it is equally appropriate here.

Adequate remedies in the F.B.I. charter are central to the effectiveness of this very important piece of legislation. During the legislative process, we hope that the issues discussed above will be given intensive consideration so that the resulting charter will improve on present law and stand behind the principles it espouses. We intend to address these and other issues raised by the charter in our forthcoming report.

Mr. EDWARDS. The gentleman from Massachusetts is recognized.

Mr. DRINAN. Thank you, Mr. Chairman.

I wonder, Ms. Imholz, would you expand a bit on the Federal Tort Claim Act? One of the contentions made by people is that we are singling out the FBI and they don't like that.

Would you explore the possibility of amending the Federal Tort Claims Act so that it would cover all agencies. It would cover the Drug Enforcement Agency and IRS and FBI, and then we would not be challenged by the FBI and others that we are singling out the FBI. We would give uniformity of treatment under a modernized or streamlined Federal Tort Claims Act.

Do you think that is possible?

Ms. IMHOLZ. Well, I really don't think it is, for two reasons. I think that the proposed amendments to the Tort Claims Act really sweep with too broad a brush. The situations are so different with each different agency.

I understand that many of the other agencies have expressed their concern about a statute that broad, that would cover all of their conduct.

The FBI is being singled out by reason of having a charter at all. I don't refer to any past revelations, I merely say that this is the premier law enforcement agency of this country and they have special rights that no other Government employees have. They have more opportunity to invade citizens' rights. They do not object to this statement of principles, and that is the reason for specifically addressing that.

The Federal Tort Claims Act is one of the most confusing and unwieldy statutes even now, when it is designed to exclude a lot of Government conduct. We have studied this in great detail in connection with our other report.

You speak of streamlining the Federal Tort Claims Act. I haven't seen any proposals. The present legislation only considerably complicates what is already a very complicated statute. It is perhaps unavoidable, when you have a statute that covers such a broad range of conduct, that that be the case.

I can see the reason for the discretionary function exception, or certain taxation exceptions—there is a whole list of exceptions in the Federal Tort Claims Act, which is primarily designed to cover negligent torts. There are some very good reasons for that kind of thing.

The Government has to be able to function. Anything that is as broad as those proposed amendments has to have exceptions, has to be complicated.

You have already heard testimony, or the subcommittee that is dealing with the Tort Claims Act has heard testimony, from Ruth Prokop of the Merit Systems Protection Board. In her testimony, she was eager for the Board to take on the new role. But she noted some of the complications of the disciplinary mechanism that is proposed by that statute. If a simplification comes I would be very glad to see it. But I don't really believe it can be done.

Mr. DRINAN. Could we take another step. Could we take the Foreign Intelligence Surveillance Act of 1978 and change and modify it and achieve the objectives your association wants.

Ms. IMHOLZ. Why, when you have a long list of principles in a piece of legislation, H.R. 5030, don't you put the remedy right there for violations of them? I don't think—

Mr. DRINAN. The remedies proposed in the Foreign Intelligence Surveillance Act are in your judgment satisfactory?

Ms. IMHOLZ. Yes, that is right, for what they cover. They include what we consider appropriate, such as liquidated damages. I think that a provision modeled after the remedial provisions in the Foreign Intelligence Surveillance Act or modeled on the Omnibus Crime Control Act, on domestic wiretapping, would be appropriate.

I don't see why it shouldn't be a part of this legislation, and in this chapter. Because although the intrusive technique of wiretapping is surely one for which there should be a remedy, there are others. I don't see how you could amend those statutes without incorporating the whole charter. That is my point.

Mr. DRINAN. One last question, Mr. Chairman. Would the association oppose the enactment of a law if it had no sanctions or no remedies?

Mr. CLARK. Well, I don't know that we have specifically considered that, Congressman Drinan. So I guess I better reserve on that, and I will ask—

Ms. IMHOLZ. I think it is likely in view of the positions that we have taken in the past. In a month or two we will issue our full report.

Mr. DRINAN. I look forward to the full report.

Ms. IMHOLZ. I do think it is likely, but I cannot speak right now.

Mr. DRINAN. Thank you very much for your testimony.

Mr. EDWARDS. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

One of my interests has always been the exclusionary rule. I noted with interest the statement that respect for the law is very important.

I find one of the factors that contributes to disrespect for the law in the average layman's mind is seeing flagrant evidence of guilt kept from the jury because the search and seizure may have been technically improper and the evidence is thrown out with the result that an obviously guilty person walks free. Furthermore, there is no sanction on the man or woman who made the bad search and seizure.

The only sufferer is the public. We ought to be looking for remedies for that anomalous situation in order to create respect for the law.

I am just wondering if there wouldn't be some way of sanctioning an improper search and seizure appropriately, but at the same time not doing violence to the obvious truth, not destroying the purpose of the trial, that is, not whether the constable blundered but whether the person is guilty or innocent.

It is just kind of a general prayer that the innovativeness and creativity of the association might come up with something to resolve the single thing that in my mind creates so much disrespect, if not for the law then for the court processes. The public reads that.

There is a ton of heroin in the car but because the license plate doesn't have a light on it, it is all excluded. Nobody sanctioned—the crime goes unpunished. That is just a little pet interest of mine. I plead for your thoughts on that subject.

Mr. CLARK. Congressman Hyde, your invitation that we address that subject is so irresistably flattering that I cannot refuse it. The Supreme Court obviously has set some strictures constitutionally about the effects of unconstitutional searches and seizures which go far to create what you rightly say is an anomalous situation.

Following the Supreme Court's lead, legislation has carried forward the anomaly. Without trying to defend it, I guess it is fair to say that it has been thought more important to insist that law enforcement agents set, if you will, a higher standard of obedience to the law than the average citizen and having the exclusionary rules consistent, essentially consistent, with the Supreme Court's view of the constitutional provisions on search and seizure has created the situation you are talking about.

I do accept your invitation, though, and we will look at that. We have looked at it in connection with this legislation.

Ms. IMHOLZ. There certainly is a lot of debate on that subject as to the effect of the exclusionary rule, and whether it does deter the kind of conduct that it should deter. This is why among other reasons I am especially glad to see the provision I pointed out, about the director establishing an effective system of sanctions.

That hasn't existed to date. If it is developed, I think it will help avoid those anomalous situations you mention where an obviously guilty person cannot be convicted.

Mr. HYDE. I am trying to wrestle with that and have kicked it around with other people. It is a judicially created rule, never legislated. In my judgment it really doesn't deter.

They make a bum search and seizure, the evidence is suppressed, and on with the next case. It creates contempt for the process.

It seems to me if some sanction, a meaningful sanction, for the bad faith wrongful search and seizure—not the good faith search and seizure

because then the policeman will just avoid every search and seizure if he is going to lose his promotion or his pay, or going to go to jail.

But there is a line there where justice is being frustrated. It is not effective in deterring bad searches and seizures.

I don't have any answers. I defer to your expertise. Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

I am interested, provided the civil remedy which you propose is enacted by Congress, whether you would support a provision in that remedy which would deny relief upon a finding that the FBI agent acted in good faith.

Ms. IMHOLZ. Well, we certainly don't think that an FBI agent who acted in good faith should be penalized for conduct that is found to be in violation of the charter. But we think that there should be a remedy against the Federal Bureau of Investigation in that case.

We are very sensitive to the fact that one of the main spurs to legislation of this sort has been the confused state of the law. The United States has only waived its sovereign immunity partially, and a number of agents have a number of lawsuits against them that have gone on for years.

As we said in our 1977 report, in most cases it is not necessary to hold individuals liable. If there is a finding of their good faith, I don't think that they should be held liable.

But there should be a remedy against the FBI in any case, as we wrote in our report.

Mr. SENSENBRENNER. Following up on that, do you believe that the civil remedy should act primarily as a deterrent to violations of the charter or in the alternative to provide compensation for victims of those violations?

Ms. IMHOLZ. It should obviously do both. It is the only sanction that would compensate people who are injured. But I think the deterrent aspect is very important also. That is why there is a liquidated damage provision in the Omnibus Crime Control Act, its domestic wiretap provisions.

I think that should be extended to all investigative techniques. That is primarily a deterrent effect there, since there often is no actual damage.

Mr. SENSENBRENNER. One final question. If the civil remedies provision is passed, what limits would you propose putting on pretrial discovery, so that sensitive and classified information would not become a matter of public record?

Ms. IMHOLZ. The Federal Legislation Committee has just reviewed the proposed grey mail statutes. Perhaps I am not exactly sure what you are asking me.

Mr. SENSENBRENNER. I just do not wish to use the civil remedy as a license for an attorney for a plaintiff to go rummaging through FBI files which might contain information that should be classified because it is in the national interest for it to be classified, or might contain information relating to other individuals and transactions that are completely foreign to the matter that is being litigated.

Ms. IMHOLZ. Well, I think the Federal Rules of Civil Procedure adequately permit trial judges to limit the information that an attorney can discover and make public also.

I think trial judges have in the past been pretty sensitive to that issue. I haven't seen any specific provision that would limit the disclosability of any of this information. I do think that the present rules of procedure are adequate.

Mr. SENSENBRENNER. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Thank you.

The charter would become a part of the Federal law. You believe if an agent of the FBI violates the charter that the agent should be responsible for whatever damages he or she is responsible for.

Ms. IMHOLZ. Well, his agency should be responsible.

Mr. EDWARDS. Pardon?

Ms. IMHOLZ. We believe that if the agent acted in bad faith he should be responsible: A standard of culpability higher than just ordinary negligence.

Mr. EDWARDS. And the Government should be responsible, also, at the same time. So both entities would be responsible.

Ms. IMHOLZ. Yes. And we believe that rather than make the defendant affirmatively prove his good faith, there should be a presumption that he acted in good faith.

Because indeed that is the case most of the time. If the plaintiff can prove that the individual acted with willfulness or malice, then the individual should be liable, too. But we do not recommend a standard under which he could be routinely sued.

Mr. EDWARDS. Many violations of the charter would certainly not be a crime and perhaps would not even constitute a tort, and result in minimal, possibly no damage at all. That is very clear, isn't it.

How would you treat cases where an agent or an employee violates a charter and it is not a tort or it is not a crime.

Mr. CLARK. Well, Mr. Chairman, I think it is necessary to distinguish, as you are doing, between violations that relate entirely to perhaps the effectiveness, the running of a tight ship as an agency.

For example, if there are provisions that an investigation, a file is to be closed with so many days, and that is violated, the time runs on, nobody is hurt by it, it simply means that a tight ship isn't being run administratively, we would be quite content to have violations of the charter of that nature not result in any compensatory or liquidated damages.

On the other hand, if there are statutory violations that result in damage, we believe certainly the Government should be liable, and in addition, in cases where there is clear and exaggerated bad faith, the agent personally should be liable.

Now, those are difficult distinctions to draw. I fully understand that, but we start with the presumption that if there is a wrong, there should be a remedy. If one were to try to draft this provision for remedies, one would start, I think, with a simple statement that persons damaged by violations of this chapter shall have the right to bring suit in the Federal district court for damages.

Then we would turn to the FBI for a list of exceptions which would be a description of those kind of violations which are the kind you and I started to talk about, having to do with the running of a tight ship and good administration and so forth.

Ms. IMHOLZ. I think that many of those things would be taken care of in the guidelines and other procedures, and we are not recommending that there be a broad civil remedy for violations of the guidelines.

I think most of the principles in the charter are pretty important such as control of intrusive techniques, although as the Federal Tort Claims Act amendments recognize, there is often no actual damage in those cases. It is important to deter that kind of violation.

There may be provisions in the charter itself whose violations should not give rise to a liquidated damage claim. But most of these things are very important. Most of the things that do relate to running a tight ship would be in guidelines and other procedures.

Mr. EDWARDS. My last question has to do with the accountability insofar as oversight is concerned. We have no right to obtain access to any FBI file. We have no way of knowing what is going on in the file from the congressional point of view.

Now, we had a witness or witnesses from the Seattle area who described to us the Seattle Police Department intelligence ordinance where the mayor could appoint an independent auditor who would be approved by the city council and the auditor has a right in Seattle to look, to audit police files, which certainly would provide a large degree of accountability.

How do you feel about that insofar as the Federal Bureau of Investigation is concerned?

Ms. IMHOLZ. One of the recommendations in our 1977 report—and I am pretty sure that our forthcoming report will contain similar provisions—was that in addition to the structural remedies there just has to be adequate oversight of a variety of different kinds.

I don't know specifically what the committee will decide to recommend, but I am confident that that will be part of our recommendation.

Mr. EDWARDS. Thank you.

Mr. CLARK. Could I comment, Mr. Chairman.

Just from experience in civil litigation in the Federal courts in particular, it is not uncommon when, for example, both parties during discovery claim that their documentary materials are confidential, by reason of trade secrets and the like, to have a referee appointed by the court or a special master to examine those papers in such a way as to preserve the confidentiality, and nevertheless let, in this case, litigation proceed. It is similar to the technique you describe in Seattle.

Mr. EDWARDS. Thank you.

Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

I wonder if one or both of you would comment on the situation in the city of New York. They have had a lawsuit there for some time arising out of allegedly improper activities of the intelligence units of the city.

I wonder if there is something that we can learn there, or would you think that there are differences between a police department like that in New York and the FBI?

Ms. IMHOLZ. Well, I am not familiar with the facts of the ongoing case in New York. I think there are differences between a municipal police department and the FBI. But as I mentioned at the beginning of my testimony, one of the reasons for having the best possible provisions in this charter is that I think it will be a model for local situations.

Are you familiar with that litigation?

Mr. CLARK. No, I am not.

Mr. DRINAN. What are the differences? Why should we treat the FBI different from the city police of New York in their intelligence activities?

Ms. IMHOLZ. I don't see why it shouldn't be a principle of all law enforcement agencies that they shall be concerned only with conduct and only with such conduct as is forbidden by a criminal law.

Mr. DRINAN. Both of those would be applicable to the FBI. In other words, you are saying the FBI should not get any treatment different in basic principles from the city of New York.

Ms. IMHOLZ. I think the city of New York Police Department should be bound by that principle also.

Mr. DRINAN. Are there any differences that we should take into consideration between the FBI and other police forces?

Ms. IMHOLZ. Well, the FBI has different functions.

Mr. DRINAN. They investigate Federal rather than State crimes. What functions are different? They are claiming that, or insinuating that, this is the super police force as if they need more leeway than other police departments.

Ms. IMHOLZ. Their function as the Federal police force makes it more likely, as indeed the past has shown that they may investigate political activity. The differences in the functions of the FBI and local police don't lead to any difference in this basic principle about investigating criminal conduct. I think they should all be bound by that.

Mr. DRINAN. Do you think in the bill that they wrote, and that has been filed here by Chairman Rodino; do you think that they overclaim? Do you think that they are asserting rights that the New York City police are not entitled to, and therefore the FBI are not entitled to?

Ms. IMHOLZ. I don't know. The terrorism section—

Mr. DRINAN. I am glad you mentioned that because when we get to that they begin to intimate that we have a right and duty to prevent these things from happening.

Ms. IMHOLZ. Prevent is a word that gets used very loosely. That is one of the things with which we are concerned and with which our final report will deal. Obviously any law enforcement agency should be able to prevent crime from taking place in the presence of the officers but it becomes a very difficult matter to deal with when the situation is more remote.

I know how much attention this section has had from a lot of very conscientious people. I am really not prepared to comment on it today because I don't have my committee's formal position. But it is a crucial one.

We are going to give it a lot of attention. I am sure you are going to also.

Mr. DRINAN. I am certain that your association has done a good deal of work concerning the activities of the DEA. Drug Enforcement Agency. It is a huge group. They now receive \$196 million. They have a great base of operation in New York City and elsewhere.

I wonder if you would think that the principles that we are developing for the FBI, which should be the same in substance for the New York City police, should also apply to the DEA?

Mr. CLARK. I think our answer to that one would be yes. We are dealing on the one hand with constitutional rights of citizens and other inhabitants of the United States, and those rights are the same whether infringed by local law enforcement officers, Federal law enforcement officers, whatever type of law enforcement is going on. So it seems to us the basic principle should apply.

Similarly, we do not believe that basically speaking one law enforcement agency should have privileges to invade the rights of people that others should not have.

Now, there may be within that very broad generalization some specific instances which don't now occur to me. No doubt you have had testimony with respect to it, which might in a particular case justify some difference.

But as a broad principle I think we would not accept the notion that a Federal police force, however described, should enjoy greater rights to invade the rights of citizens than a local police force.

Mr. EDWARDS. Would the gentleman yield at that point?

That is a very important point because under the present law, local and State officers are liable under Federal law for violating constitutional rights, both civilly and criminally, and yet there is no Federal statute that says, to my knowledge, if a Federal officer violates a constitutional or a civil right, under control or law, Federal law, is liable for damages.

Mr. CLARK. Well, that difference does not make sense to me. I think we have expressed some skepticism that pursuing remedies against individual law enforcement officers is not truly practical in most instances. Our preference would be to have the agency or government employer be the entity that is liable.

But we would have that principle applied broadly across the full sweep of law enforcement officers.

Mr. DRINAN. Thank you, Mr. Chairman.

I think we should extend 1983 to Federal officials, or have something along that line.

I assume that you would want the protections that you have in your testimony to extend to informants who work for the FBI. Let me read you something disturbing to me in 5030.

The FBI shall advise each informant that he is neither an agent nor employee of the FBI and his relationship with the FBI will not protect him from arrest or prosecution for the violation of any law, and that the FBI will not sanction his participation in criminal activity except insofar as a supervisory FBI or Justice Department official determines pursuant to clause (a) that this participation in criminal activity is justified.

Would you recommend that there be a subpoena or rather a warrant before the Justice Department can authorize the participation of one of its informants in criminal activity?

Mr. CLARK. Well, I confess that I have not addressed that question until this minute, and I don't know whether Ms. Imholz' committee has.

Mr. DRINAN. Well, it is very relevant to remedies because if in fact this informant is told that, "We have a warrant for you to participate in criminal activity," can he thereafter be sued?

Mr. CLARK. I would say, really just expanding on what we said earlier with respect to FBI agents, the informer acts in good faith, we would say you shouldn't be able to sue the informer. But on the other hand even if the informer is not technically a Government agent or employee, if he is acting as an agent under the circumstances—

Mr. DRINAN. But he is not. They have made it very clear that they are disassociating themselves from informants, and they are on their own, and that the informant violates the privacy and the rights of American citizens, and under this, as I see it, there is no remedy.

Mr. CLARK. Well, I am saying they shouldn't be able to disassociate themselves from the acts of the informant if they encourage the informant to do it, and he does it with the knowledge of the agency.

That, to me, is another catch-22.

Mr. DRINAN. On a related question, do you think that after the FBI has invaded the privacy of an individual that after a period of time they should inform that person that they opened his mail, or that they entered his apartment, or that they did surveillance through his friends?

Ms. IMHOLZ. Again, the committee has formally issued its position on that point. But our 1977 report did state that there should be a notification procedure, at least before files are destroyed, because there isn't really any other way for people to find out unless they affirmatively bring a Freedom of Information Act or a Privacy Act request, and even in that situation they may not get all their files.

It depends on what kind of provisions the charter ends up with on the retention and destruction of records. But I think generally the committee does feel that there should be a notification procedure.

We recognize that there are a lot of practical problems.

Mr. DRINAN. Should the person on whom the surveillance was done have the option of requesting the destruction of the file?

Ms. IMHOLZ. Well, once he knows about it there is no more reason to keep it.

Mr. DRINAN. Can he tell the FBI, "Destroy that file"? Well, I welcome your further thoughts. These are the remedies. Not merely are there monetary remedies as suggested in your text, but there are other remedies for those who may not be hurt, but whose privacy has been invaded.

I would think that the Privacy Act has remedies along the lines that I suggested, and pursuant to your testimony, they should be incorporated into any charter.

Ms. IMHOLZ. Are you referring to the clause in the Privacy Act that when an agency contracts out certain activities the Privacy Act provisions are extended to its contractors? This is a defect in the Federal Tort Claims Act from the constitutional viewpoint, because Government contractors are specifically excluded, which is understandable when somebody is building a ship for the Government. You don't want the Government liable for the contractors' negligent torts. Yet there is a sense in which an informant could be considered a contractor of the Federal Government. The Privacy Act provision that extends its protections to those with which the agencies contract seems like an appropriate one.

Mr. DRINAN. I thank both of you again. It has been very, very helpful. Thank you very much.

Mr. EDWARDS. Mrs. LeRoy?

Ms. LEROY. It has been suggested by a previous witness that there be a civil remedy added to the charter which would allow recoveries for substantial violations of provisions of the charter which infringe on political and religious freedoms, basically limiting recovery to first amendment sorts of activities.

Would you comment on that proposal. Do you think that that is an effective way to limit frivolous and unmeritorious suits?

Ms. IMHOLZ. We think it should be broader than that. I recognize that that position is one that responds to the area where the greatest number of violations have occurred in the past.

But when you are setting up a structure for the future, we don't see any reason for limiting it in that way. I think frivolous suits will be weeded out the same way, whether it is first amendment activity that is involved or whether it is intrusive techniques, or whether it is an investigation initiated without the standards required by the charter. We don't see any real justification for limiting it that way.

Ms. LEROY. Might a civil remedy provision holding an individual liable have an inhibiting effect on his vigor with which he pursues his legitimate law enforcement functions? Has that happened with respect to, say, 1983 and 241 and 242 were seen with respect to Bivens, or the 1974 amendment of the act.

Ms. IMHOLZ. Under the present state of the law, the great confusion has probably inhibited some Federal employees. That is why we would like to see it made very clear.

Under the scheme we propose where the Government would be primarily liable and the individual employee only liable in extraordinary circumstances, when he acted with a standard of culpability beyond the ordinary, we think this would reduce any inhibiting effect and actually improve the situation.

Now, obviously, under section 1983, State and local government officials don't have that protection. There is conflicting evidence on the effect it has had. I have spoken recently with some police officers who say they never think about it. But we really don't see the need to have that low standard of liability for individuals.

Ms. LEROY. I have no further questions. Thank you.

Mr. EDWARDS. If there are no further questions, we thank the witnesses with great enthusiasm. We have all long been admirers and are beholden to the association for the kind of work that it does and its immense assistance to Congress and indeed to the administration of justice and law enforcement and the enforcement of civil and constitutional rights throughout the country for many years.

Certainly here in this particular area you have provided an immense service. We thank you very, very much for coming today.

Mr. CLARK. Thank you, Mr. Chairman, particularly for your kind words, and Congressman Drinan's words. We would love to welcome him back to our membership and remind him our nonresident dues are very low. Congresswoman Holtzman continues as a member at a much higher rate.

Mr. DRINAN. I will join.

Mr. CLARK. Thank you very much.

Mr. EDWARDS. Our last witness today is David Rudovsky, vice president of the National Lawyers Guild, and staff attorney for the National Emergency Civil Liberties Committee. Mr. Rudovsky is also a partner in the Philadelphia law firm of Karys, Rudovsky & Maguigan.

He has been involved in civil rights litigation with the FBI. His experience should be helpful to us in deciding whether existing law provides adequate remedies in enforcement mechanism.

Mr. Rudovsky, we welcome you. Your entire statement will be made part of the record. You may proceed.

**TESTIMONY OF DAVID RUDOVSKY, VICE PRESIDENT, NATIONAL LAWYERS GUILD, AND STAFF ATTORNEY, NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE**

Mr. RUDOVSKY. Thank you, Mr. Chairman.

I don't want to repeat ground that has already been covered. I would state initially that our views coincide in large part with the views that were just expressed to this committee.

We have some differences—I think some small matters—with the Association of the Bar. I will try to detail them in my testimony.

First: I would like to state that as a member of the National Lawyers Guild and as a staff attorney to the National Emergency Civil Liberties Committee, I speak not only on behalf of those organizations but attorneys in those organizations who have represented individuals and groups who have been subjected to FBI abuse in the past.

Not only have we represented such groups and individuals, but indeed both our organizations have been in the past targeted by the FBI for intensive, and in our view illegal, politically inspired investigations.

The FBI investigated the National Lawyers Guild for over 35 years without uncovering a single incident of illegal conduct. During the course of that so-called investigation, they wiretapped members' phones, they committed burglaries, removing papers and documents from members' offices.

You may be familiar with the fact that Thomas Emerson, a law professor at Yale, in 1947 was preparing a draft of a law review article critical of the national security program being developed by the administration at that time.

The FBI got wind of it, burglarized his office, stole the draft of the article so that they could have a response even before it was published in the Yale Law Journal. It was that kind of activity that the FBI participated in with respect to the Lawyers Guild and the Emergency Civil Liberties Committee over a long period of years.

We don't want to dwell in the past, but I think history must be a guide with respect to what this committee and what Congress does with respect to future FBI actions.

The FBI has complained apparently in these hearings and in other hearings that they are being singled out for special treatment if sanctions are going to be imposed against them.

We suggest that they have singled themselves out by their prior actions, and notwithstanding their statements to date that they have cleaned up their act, that the Cointelpro operations are over, they are not in the business any more of investigating persons' political beliefs, you are writing an act for the future.

You are not only writing an act for this administration or this Director of the FBI, you are writing an act that hopefully will control the FBI for many years in the future. I think we have to look to the possible abuses, and in doing that look to history as a guide. We also start with a basic premise that where there are certain rights established by Federal law there ought to be remedies commensurate with those rights. Congress has done that in numerous areas before, not only in section 1983, which has been discussed today, but numerous Federal acts.

The wiretap provision of the Omnibus Crime and Control bill in 1968 has a civil remedy. The foreign wiretap law has a civil remedy. Title VII, the Anti-Discrimination Employment Act, has a civil remedy.

There are numerous Federal laws which contain civil remedies for their violations which would compensate innocent victims of misconduct. So you are not creating any great precedent by establishing a sanction or a remedy in this particular bill.

As I understand the FBI's and the Department of Justice's opposition here, they claim not that there shouldn't be a remedy, but that the internal discipline which would be mandated by this bill would be sufficient in conjunction with supposed alternative remedies—the *Bivens* action, the Federal Tort Claims Act and the like.

I would just like to spend a couple of minutes on what those supposed alternatives are and how they have worked out in practice.

The *Bivens* remedy, as already has been testified to, would allow a citizen to sue for a violation of a constitutional right. So far the Supreme Court has said that applies to the fourth amendment for an illegal search and seizure and last year said it would apply to a due process violation in the *Davis v. Passman* case. They have not yet extended the *Bivens* remedy to the first amendment or to privacy violations.

The Department of Justice has been arguing vigorously in cases that are presently pending in court that the *Bivens* remedy does not apply to those kinds of violations, and that they should not apply.

Let me give you an example from one case that I am counsel on. That is a matter called *Kenyatta v. Moore*. It is a matter that arises out of an FBI Cointelpro action in Mississippi in the late 1960's.

Kenyatta was a civil rights activist. He was working on a college campus in Mississippi. The FBI did not like the kind of work he was involved in, although there was nothing illegal about it. They sent him a threatening letter, supposedly signed by another black organization in Mississippi, telling Mr. Kenyatta that unless he got out of the State of Mississippi quickly, they would take care of him; implying physical retribution to him unless he left the State of Mississippi.

This letter was thought of and originated in the FBI offices, sent to Mr. Kenyatta, and as a result of that letter Mr. Kenyatta left the State of Mississippi and gave up his politically protected work in Mississippi.

This came to light in the 1970's. Mr. Kenyatta has sued, under a *Bivens* theory, the three agents who were responsible for authoring and sending that letter.

In that case, the Government's contention—and the Department of Justice represents these two agents—is that there was no violation of Mr. Kenyatta's constitutional rights, that he had no constitutional right to be politically active in Mississippi, that the *Bivens* remedy should not be applied beyond the fourth amendment, and therefore Kenyatta's assertions concerning first amendment activity were not compensable under *Bivens* and that there was just no violation of constitutional law that would or should be compensated in that case.

They have taken the same and similar positions in other litigation under *Bivens*. They have a very narrow view of *Bivens*. I don't begrudge them the right on behalf of their clients to argue for the nar-

rowest view under *Bivens*. The point is, however, that if they prevail in that view it means that persons whose rights have been violated by the FBI cannot gain compensation under *Bivens* and *Bivens* cannot be considered an alternative remedy to a sanction or remedy in this statute.

Similarly I might point out that the Federal Tort Claims Act, as already has been testified to, does not provide a sufficient remedy. Neither *Bivens* nor the Tort Claims Act, even under its most liberal interpretation, would allow for compensation for violations of rights that were not of constitutional dimension.

Even a liberal interpretation of *Bivens* would not give the family of Jean Seberg the right to sue the Government because basically what was involved there was defamation, something the Supreme Court of the United States in the *Paul v. Davis* case says does not rise to a constitutional level.

In *Laird v. Tatum* in 1971 the Supreme Court of the United States said that mere surveillance, physical surveillance of people, even if it is based on their political views, does not fit the first amendment.

Therefore, the kind of surveillance that the FBI has been edged in in the past, unless it involved an intrusive entry into someone's home, would not be compensable under either *Bivens* or the Tort Claims Act; that is, the range of activity that would be covered by this bill, which this bill would seek to prohibit, would not be covered under a *Bivens* theory because it is not a constitutional violation.

I think we all know that the Supreme Court is not at this point in time on a program of constitutionalizing every possible Federal tort. Let me give you one example.

A trash cover. The courts of the United States have traditionally held once you put something in your trash, you give up any right to it in a fourth amendment sense.

Yet, I think we all know that when we dispose of certain documents, certain drafts of opinions, certain drafts of memorandums, we don't want the FBI or any other Government agency to take them, to look at them at their will. If that was done, there is no constitutional violation and there could be no remedy for a person under the *Bivens* or the tort claims alternative.

So, I suggest that the Department of Justice's claim before Congress that *Bivens* and the Tort Claims Act provides an alternative remedy is wrong on its face, and disingenuous and somewhat hypocritical, given the position those same lawyers are taking in court in pending litigation.

I think what you ought to examine and contrast is their testimony before committees and the pleadings they file in court. I think what you will find is two different theories of the law. I think they are arguing two different things before two different tribunals.

The other two remedies that the Department of Justice talks about is the possibility of criminal prosecutions if an FBI agent breaks the law, and again the possibility of internal discipline.

I listened to their testimony on the Senate side with respect to internal discipline, and they were asked how many agents have been disciplined internally as a result of Cointelpro activity.

They were not able to cite one example in the past 10 years since Cointelpro came to light, where an agent who took actions under Cointelpro violating the rights of American citizens was ever disciplined internally in the FBI.

I suggested the track record there, as it is with criminal prosecutions—I know of only one criminal prosecution that is pending as a result of illegal FBI activity—debunks their theory that either criminal prosecutions or internal discipline is going to provide an effective remedy.

Of course, both of those on their face would only even if applied help to deter future misconduct by individual FBI agents. The internal discipline and the criminal prosecutions would not compensate individuals who suffer damages as a result of illegal FBI activity.

I have nothing against the internal disciplinary group. I have nothing against criminal prosecution of FBI agents or anybody else who breaks the law. In addition, however, there ought to be a civil remedy which provides damages to people whose rights are violated.

I want to end by pointing out what we would think would be the appropriate principles that should be followed in establishing a civil cause of action.

No. 1, let me say that we don't think that where agents act in good faith and can establish that they acted in good faith under existing law, or under existing standards, that they should be individually liable.

However, we would think that the FBI or the U.S. Government should pay the damages in those situations. At page 11 of my statement I outline what we think ought to be the principles for a sanction in this area. They deal mainly with FBI activity that intrudes upon protected political activity of U.S. citizens where they violate constitutionally protected rights, where the FBI agent intentionally violates the charter's restrictions on investigative techniques, where the FBI agent intentionally defames a person or organization in retaliation for that person's exercise of constitutionally protected rights, or for any kind of preventive action in the nature of Cointelpro.

There ought to be liquidated damages for such violations and punitive damages upon a showing of malice or willfulness. There ought to be available injunctive and declaratory relief to terminate ongoing illegal FBI activity.

We think that where there has been an intentional or deliberate violation of the charter there ought to be grounds whereby evidence gained as a result of such intentional activity can be suppressed or subpoenas quashed.

Those are the principles that we think should inform any kind of provision dealing with sanctions or remedies on this bill.

Thank you very much.

[The information follows:]

STATEMENT OF DAVID RUDOVSKY, VICE-PRESIDENT, NATIONAL LAWYERS GUILD, AND STAFF ATTORNEY, NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, ON THE FBI CHARTER (H.R. 5030)

#### I. INTRODUCTION

On behalf of the National Lawyers Guild and the National Emergency Civil Liberties Committee, I wish to thank the Committee for this opportunity to testify on 5030, the FBI Charter Bill.

Both organizations on whose behalf I testify today have been the targets of politically inspired FBI investigations. The National Lawyers Guild was the target of an intensive, highly intrusive and, in our view, illegal investigation for over 35 years. During this period of time (1940-1975), the National Lawyers Guild and its members were subjected to electronic and physical surveillances, disruption of its meetings and activities, including its litigation and related busi-

ness, and theft of membership lists and internal documents. The entire scope of this "investigation" (which for 35 years revealed no illegal activity) is not yet known, but the picture that clearly emerges from government documents secured to date, demonstrates a concerted effort on the part of the FBI to destroy the Guild as a legal and political institution. See Exhibits A-D, attached hereto. The matter is currently in litigation. *National Lawyers Guild v. Attorney General*, No. 77 Civ. 999 (S.D.N.Y.).

From 1952 to 1976, the FBI investigated the National Emergency Civil Liberties Committee (NECLC) and accumulated an enormous amount of information on its legal activities. The FBI used informers and other surreptitious means to disrupt NECLC's organizational activities. Again, the sole basis for this investigation was the disapproval by the FBI of NECLC's political and legal positions.

Counsel for NECLC and the Guild have represented numerous individuals and organizations who were the subject of illegal FBI investigations, including the notorious Cointelpro operation.<sup>1</sup> Accordingly, I believe that we have developed some insight with respect to the issues raised by the FBI Charter, and in particular on the question of what remedies should be provided in any legislation in this area.

I do not intend to dwell on the now fully documented history of massive wrongdoing by the FBI, the general nature of which is reflected in Book III, Final Report of the Select Committee to Study Governmental Operations ("Church Committee"). It is important, however, to realize that the full record is still not known, and we can expect disclosures like that recently made in the Jean Seberg matter to continue. Moreover, it is critical that the Congress, in debating the issue of remedies for illegal FBI activities, firmly keep in mind the historical backdrop of this Charter. Congress is not writing on a clean slate. It is not creating a new organization that might be thought able to govern and discipline itself. On the contrary, the FBI's record with respect to its investigations, surveillances, and in some circumstances outright destruction of political organizations, mandate clear and unambiguous prohibitions on such conduct in the future. Correspondingly, this history plainly calls for an effective remedial scheme for any future violations. To the extent the FBI claims that a remedial scheme in this Charter would "single them out," the answer is quite simple: it is the FBI, by virtue of its past misconduct, that has singled itself out as a lawless agency which threatened the very political liberties of our Constitution.<sup>2</sup>

## II. REMEDIES

It is, in our opinion, impossible to support legislation which purportedly seeks to bring FBI investigations into a legal and constitutionally limited framework without the provision of effective remedies for persons and organizations whose rights are violated in the course of these investigations. Given the massive disclosures of illegal and unconstitutional conduct by the FBI, particularly with respect to political dissidents, it would appear that the highest priority of any Charter would be the establishment of a system of oversight and remedies to ensure compliance and to compensate victims of deliberate misconduct. The lack of such a remedial scheme in this charter raises the most serious questions of whether the FBI will adhere to the law.

We start with the basic proposition that underlies our system of government that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803, Marshall, C. J.). The Congress has on numerous occasions, in establishing rights, and limiting the exercise of improper governmental actions, created remedial statutory schemes for the compensation of victims and deterrence of wrongdoers. See, e.g., Title III, Omnibus Crime Bill, 18 U.S.C. § 2510-2520; Title VII, 1964 Civil Rights Act, 42 U.S.C. §§ 2000(e) et seq.; Foreign Electronic Surveillance Act, P.L. 95-511, October 25, 1978; 42 U.S.C. §§ 1981-1988.

<sup>1</sup> These cases include: *Philadelphia Resistance v. Mitchell*, C.A. No. 71-1215 (E.D. Pa.); *IPS v. Muenell*, No. 74-316 (D.D.C.); *National Lawyers Guild v. Attorney General*, 77 Civ. 999 (S.D.N.Y.); *Kenyatta v. Moore*, No. 577-0298 (R) (S.D. Miss.); *Burkhart v. Szabo*, No. 74-826 (E.D. Pa.); *Socialist Workers Party v. Attorney General*, No. 73-3120 (S.D.N.Y.); *Hampton v. Hanrahan*, 600 F.2d (7th Cir. 1979).

<sup>2</sup> I wish to make clear that our testimony in the issue of remedies should not be taken to imply approval of other aspects of the Charter. We are opposed to many provisions of this litigation and will submit a summary of our comments on other parts of the Charter.

Apparently, it is the position of the Department of Justice and the FBI that statutory remedies are not necessary because victims of FBI misconduct can secure relief under the theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Federal Tort Claims Act, or the privacy Act. If that is their position before this Committee, it is clear that the Department of Justice is telling the Congress one thing, while arguing a totally different theory in litigation concerning illegal FBI conduct. To demonstrate the manifest inadequacy of these "remedies," we examine each in turn:

#### A. *Bivens*

Under even the most liberal remedy of doctrine established in *Bivens* and affirmed this year in *Davis v. Passman*, 47 U.S.L.W. 4643 (U.S. June 5, 1979), a victim of FBI conduct could recover only when his/her constitutional rights have been violated. Indeed, the Department of Justice consistently argues (a) that the *Bivens* remedy should not be extended to protect one's privacy in general or to afford a cause of action for violation of one's First Amendment rights; (b) that violation of certain constitutional rights are not compensable under *Bivens*; (c) that in any event recovery should not be allowed under *Bivens* since the Federal Tort Claims Act provides a remedy and (d) that "good faith" violation of the Constitution should not be compensable even against the Governments. Without unduly burdening this Committee with examples, we respectfully refer you to the position of the Department of Justice in the litigation brought by the Socialist Workers Party, National Lawyers Guild, and other victims of FBI investigations. For illustrative purposes only, we discuss two pending matters.

In *Kenyatta v. Moore*, the government circulated false and derogatory information about the plaintiff, mailed an anonymous letter to him to give the impression he was discredited at his college, and assisted a third party in obtaining false and derogatory information about him so that funds for a human rights project were cut off. On these facts, the Justice Department has asserted that Mr. Kenyatta has no remedy at law. The Department's arguments include:

The assertion that Kenyatta's constitutional rights were in no way violated;

The assertion that *Bivens* remedies should be limited to violations of the Fourth Amendment;

The assertion that "where no violation of any other rights protected by the Constitution has occurred sufficient to find a claim for relief in damages, no violation of the First Amendment rights arises;" and

The assertion that Kenyatta was not entitled to damages because his "activities arguably protected by the First Amendment were not in fact chilled or diminished."<sup>3</sup>

Similarly in *National Lawyers Guild v. Attorney General*, where incomplete discovery has already demonstrated a wide range of illegal FBI conduct including break-ins, thefts of papers, and wiretapping, the Government argues that no cause of action exists for the plaintiffs.

Accordingly, it is clear that the Department of Justice, its statements in connection with the Charter notwithstanding, continues to argue positions in Court that would render *Bivens* meaningless. Even under a broad reading of *Bivens*, only constitutional torts would be compensable. Yet the Charter, as a matter of public policy, addresses many types of investigative techniques which to date have not been considered by the Supreme Court to be of constitutional dimension. The Court, of course, is not in the process of constitutionalizing all aspects of the law enforcement process. Yet many kinds of investigative techniques, e.g., informers, physical surveillance, trash covers, and investigative demands, that are proposed in the Charter, while not of "constitutional" dimension, have a substantial impact on one's privacy and political rights. For example, the invasions of privacy occasioned by the placing of an informer in a political organization or the seizing of "trash" containing sensitive communications are far greater than that caused by a mere stop and frisk, and yet, for historical constitutional reasons, only the latter is subject to constitutional restraints.

Moreover, given Supreme Court decisions holding that there is no constitutional right to be free from governmental surveillance of political activities<sup>4</sup> or to be protected from governmental defamation,<sup>5</sup> unless this Charter provides remedies

<sup>3</sup> Memorandum in Support of Motion for Summary Judgment, Dec. 22, 1978.

<sup>4</sup> *Laird v. Tatum*, 408 U.S. 1 (1972).

<sup>5</sup> *Paul v. Davis*, 424 U.S. 693 (1978).

for unlawful surveillance, smear tactics, defamation and similar activities that were an integral part of COINTELPRO, future Martin Luther Kings, Fred Hamptons, and Jean Sebergs will have no recourse for the terrible injuries suffered by them.

Finally, we must emphasize that *Bivens* litigation is extremely complex, time consuming, and expensive. The Government has defended every such action with tenacity, and most cases have run for many years without resolution. We do not begrudge the defendants in these cases the vigorous advocacy of their counsel (provided free by the Government), but that is not the issue. Litigation of *Bivens*' violations is the exception; most victims of FBI abuses simply cannot afford the time and expense of suit, even assuming they can interest counsel to take on their case. Moreover, given the recent ruling of the United States Supreme Court in *Casey v. Phipps*, 435 U.S. 247 (1978), damages in these cases, even if liability is proven, may in many circumstances be no more than a nominal award.

In determining the constitutionality of a particular investigation or investigative technique, the judge is asked to weigh its law enforcement value against its impact on constitutional rights. Unlike the Congress, which in enacting a charter can evaluate a single investigation or technique in the context of an extensively documented over-all picture, the judge must perform this delicate task relatively "in isolation," on the basis of the record in the single case before him, which may or may not fairly reflect the real value or impact of the practice at issue.

Moreover, the extensive efforts of courts and litigants in the few such cases which reach a decision on the merits result, at best, in only chipping away at tiny fragments of the many questions addressed in the FBI Charter bill. Several decades will pass before the courts, in these sorts of cases, can even reach most of the questions now before the Congress. And if and when they do reach them, the courts will be permitted to decide only their constitutionality, not whether they should be permitted or remedies as a matter of sound public or legislative policy.

#### **B. Federal Tort Claims Act (FTCA)**

The FTCA currently exempts from its remedial scheme any "discretionary" acts of FBI agents and limits recovery for intentional torts to claims arising from illegal searches, seizures, false imprisonment, and the like. 28 U.S.C. § 2680(a) and (h). Thus, the FTCA does not provide relief for the wide range of free speech and association violations that have resulted from FBI misconduct. Nor should it be surprising that the Government has argued that the FTCA should be read quite narrowly to preclude such actions. Of course, the FTCA has several other drawbacks as well. There is no right to trial by jury, the individual wrongdoer cannot be sued, and no punitive damages are allowed. In sum, the Act provides little relief for the victims of misconduct.

The Administration has recognized the inadequacies of the FTCA in its proposed Amendments to that Act. (S. 695). But the proposed amendments are far from satisfactory. The creation of a remedy in *Bivens* and *Davis v. Passman* was a response to the necessity for extraordinary judicial action lest no federal remedy whatsoever be available to the plaintiffs in those cases. The proposed amendments would provide an alternative remedy. The availability of that remedy could preclude any further *Bivens* actions. The Justice Department has pressed closely analogous "alternative remedy" arguments in recent and pending litigation.<sup>6</sup> Moreover, even if the Administration proposal is properly amended and enacted, it would not reach the most important limitation on constitutional tort theory—i.e., only constitutionally protected rights are available.

We understand that the FBI contends that a provision for civil remedies would be unfair because it would single out the FBI for such treatment, thus resulting in a demoralization of the Agency. Such an argument, given any kind of historical perspective, is surely wrong. First, it is not the Congress that would be singling out the FBI: a Charter results in large part from a long history of abuses of citizens' rights by the FBI. The FBI, by its own actions, has singled itself out for special concern. Second, it simply is not true that the FBI is being treated significantly different than other agencies. It must be understood, of course, that the FBI is the principal federal law enforcement agency with a far greater potential for violating citizens' rights, particularly in the First Amendment area, than any other agency. With the broad powers entrusted to it must come commensurate responsibilities that are enforceable through meaningful sanctions.

It should also be emphasized that an effective remedial scheme can be drafted that ensures both adequate compensation for persons whose rights are violated

<sup>6</sup> E.g., *Torres v. Taylor*, 456 F. Supp. 951 (S.D.N.Y. 1978).

under this Charter, and would protect individual agents from sanctions where they clearly act in good faith. In this regard, we urge a remedies section that incorporates the following principles:

(1) Creation of a civil cause of action for any investigation of a person or organization on the basis of that person's exercise of constitutionally protected rights; for an intentional violation of the restrictions on investigative techniques authorized by the Charter; for the intentional defamation of a person or organization in retaliation for the exercise of constitutional rights; and for any "preventive action" in the nature of Cointelpro activities.

(2) Liquidated compensatory damages for any intentional violation and punitive damages upon a showing of malice or willfulness.<sup>7</sup>

(3) Injunctive and declaratory relief where appropriate to terminate ongoing illegal FBI activity.

(4) Suppression of evidence and quashing of subpoena's or other investigative demands upon a showing of an intentional or deliberate violation of the Charter. Compare the similar provisions in the wiretap provisions of Title III, 18 U.S.C. § 2510-2520.

The Justice Department has also asserted that the Charter can be enforced by existing criminal statutes and by internal discipline. Of course, a wide range of criminal statutes prohibit such conduct, e.g., 18 U.S.C. § 241 (prohibiting conspiracies in violation of civil rights); 18 U.S.C. § 2511 (prohibiting willful violations of the wiretap law); 18 U.S.C. § 2236 (prohibiting illegal searches and seizures); and 18 U.S.C. § 1702 and § 1708 (prohibiting illegal mail opening). Yet, despite the massive record of abuses and the cases turned over to the Justice Department by the Senate Select Committee on Intelligence for possible prosecution, only one indictment has come from all of these violations of law—that of the agents who burglarized the homes of the "friends" of the Weather Underground, a prosecution may still be terminated prematurely due to the fear of "graymail."

The record on internal disciplinary action is almost as barren. The Justice Department and the FBI have conducted inquiries into such cases as the campaign to smear Dr. Martin Luther King, Jr., the illegal mail opening program, Cointelpro, and the Weather Underground case. Yet we know of only one investigation resulting in disciplinary action—in the Weather Underground inquiry, involving 32 illegal surreptitious entries, 17 illegal wiretaps, 2 unauthorized microphone installations and numerous illegal mail openings (61 special agents and 7 supervisors were involved). Disciplinary action was taken against only two agents and four supervisors.

In fact, a substantial conflict of interest exists in this entire area of enforcement, whether by criminal prosecution or internal discipline. The Department of Justice has committed itself to representation of FBI agents sued for Cointelpro and other illegal activity. It is, therefore, quite impossible to realistically expect that the Department of Justice or the FBI, except in the most unusual circumstances, will seek criminal indictments or impose internal disciplinary sanctions on these same agents.

The manifest inadequacy of existing enforcement mechanisms renders the FBI Charter a mere statement of principles. Congress must recognize the need for a civil remedy that will ensure compliance with the Charter's substantive provisions.

### *c. Disclosure of informants*

Under § 513(a), the Charter would prohibit a judge from ordering the disclosure of the "identity of a confidential informant or information which would reveal such identity, except to the court *in camera*, if the Attorney General has made a determination that the informant's identity must be protected." This amounts to the creation of a new evidentiary privilege for informant information equivalent to the "states secrets" privilege and because it makes no distinction on its face between civil or criminal proceedings, could overrule the *Jencks* rule and Supreme Court decisions holding that such information is only entitled to a qualified evidentiary privilege against disclosure.

In the leading case in this area, *Roviaro v. United States*, 353 U.S. 53 (1957), the Court limited the informer's privilege to its underlying purpose: encouraging citizens to communicate information concerning *criminal activity*. Thus, the priv-

<sup>7</sup> It should be noted that a *Bivens* remedy is only available if Congress has not declared that damages should not be awarded. Thus, there is a distinct danger that, to the extent a Charter is passed by Congress that protects fundamental constitutional rights and no damages remedy is provided for violations, the courts would rule that the decision not to allow remedies is just such a Congressional declaration against implying a damages remedy.

ilege should not be extended to informants who illegally spy on or disrupt protected political activity. Moreover, even in the criminal context, the Court in *Roviaro* stressed that the privilege is qualified and should be disallowed where a party to the litigation shows a substantial need for the identity of the informant. Indeed, just this past term, the Supreme Court had occasion to stress that "evidentiary privileges in litigation are not favored." *Herbert v. Lando*, 99 S.Ct. 1635, 1648 (1979).

This provision must be deleted. The identity of an informant or information which would reveal that identity is often crucial in determining the facts at issue in litigation. In civil suits, it is often essential for the judge to permit plaintiffs access to such information to assist him in determining its relevance. While the Charter proposal would permit a judge to issue "any other order in response to such a determination by the Attorney General," the court, without the ability to as a plaintiff's counsel to demonstrate the significance of the information, may not be in a position to make appropriate findings or issue relevant orders (e.g., determine the extent of government surveillance or efforts of an agent provocateur to disrupt a group).

Finally, the proposal amounts to a significant amendment to the federal rules of civil (and/or) criminal procedure. It would be more appropriate to recommend this change to the Judicial Conference for consideration as such an amendment to the federal rules. At minimum, it should be the subject of separate legislation so that its overall ramifications (e.g., it is not limited to FBI informants and arguably can be invoked for all federal law enforcement or intelligence agency informants) can be fully examined and measured.

### III. CONCLUSION

Without adequate remedies, any legislation concerning FBI powers can be considered no more than illusory guidelines. The FBI's unwillingness to include such a provision in this Charter raises the gravest question as to whether we can expect the FBI to operate within the law. Remedies, after all, are only available for actual violations of established standards. If the FBI intends to be bound by standards, it need not be concerned with sanctions. At a minimum, Congress must establish meaningful relief for victims of FBI abuses.

Mr. EDWARDS. Thank you.

Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

I also thank the witness for his testimony. It has a particular and personal relevance because I was for a time a national vice president of the National Lawyers Guild. Every time I went to speak to the National Lawyers Guild some FBI informant would send something to my file.

I recall I spoke to the group in Detroit one night, and years later I discovered they had a long account of my talk and a copy of the program in the file. The same thing happened in Los Angeles when I spoke to the guild.

This is not directly relevant, but does the National Lawyers Guild feel during those years there were disruptions, there were informants to disrupt the work?

Mr. RUDOVSKY. The National Lawyers Guild filed a suit 2 years ago against the FBI when we found we had been subjected to this kind of surveillance. We have accumulated a large number of documents which show informants infiltrated the guild with the specific intent to disrupt its political activities, to disrupt its membership.

Indeed, there was a situation which was revealed in New York where the guild had organized in the early 1950's to hold a membership meeting in the Federal courthouse, to rent a room from the courthouse which apparently allowed legal organizations to use their facilities, when the FBI got hold of that they went directly to the chief judge of the district court there, urged the chief judge to cancel that meeting and not allow the guild to hold its meeting.

Events like this abound in the files—informants, disruption, and political espionage, and counterespionage by the FBI with respect to the guild.

Mr. DRINAN. On the testimony here, you may have said it, but are you recommending that there be a warrant required before any informant can engage in surreptitious activities?

Mr. RUDOVSKY. Yes, sir. It is not included in this testimony, which only goes to remedy. But we would think that there ought to be a warrant requirement for any of the intrusive techniques that are allowed by the charter.

It seems to us that it doesn't make sense to require that an FBI agent must first acquire a warrant before they conduct a search of one's home or one's business or one's person and not require a warrant for similar intrusive techniques, whether they be physical surveillance, placing an informant in an organization, particularly into a political organization, and the like.

The informant has much more potential for destroying or interrupting the political privacy of an organization than an FBI agent does on a single search. An informant can be there for months, for years, is able to hear everything and see everything that goes on.

It is clear that that person's activities are more intrusive than the normal search, and if a warrant is required for a search, it ought to be required for that kind of intrusion as well.

Mr. DRINAN. Has the guild tried to develop any principles that would limit the number of informants or even abolish them?

Mr. RUDOVSKY. Well, we think that there should not be ever a situation where an informant is allowed into a political organization, that the standard for the use of any informants ought to be the same as the fourth amendment standard, that unless the Government can show to a neutral magistrate or a judge that there is ongoing criminal activity, an informant should not be allowed into any kind of political organization.

Mr. DRINAN. And that is not in the proposed charter at all, is it?

Mr. RUDOVSKY. No, sir, it is not.

Mr. EDWARDS. Well, if the gentleman would yield, that is the thrust of the Seattle charter, as I recall. It starts out from a different point of view entirely and just says to the police by law in Seattle, "Thou shalt not investigate for the purpose of investigating religious, political or whatever views."

Mr. DRINAN. But that is not in the proposed charter.

Mr. EDWARDS. No. It has a criminal standard instead.

Mr. DRINAN. Would that reach the same result?

Mr. EDWARDS. I would like to ask the witness.

Mr. RUDOVSKY. Well, a strict criminal standard, if enforced, would reach the same result. I am not suggesting that a political organization can immunize itself from investigation if it is involved in criminal activity merely by calling itself a political organization.

The fact is today the FBI, under this charter, is allowed to place informers in organizations even though there is no hint and no evidence at all of criminal activity. They can be there under an investigative function.

The FBI has been doing this for years and years. There is nothing in this charter to prevent them from doing it in the future. They certainly do not have to go to a judge or magistrate to place an informer anywhere.

Mr. DRINAN. How would you respond to their contention that they simply have to have this power in connection with underground groups?

Mr. Webster sent a memo or made a statement on December 5, 1978, where he talked at length about the Weather Underground that originated or evolved from the SDS. He makes out a case saying that they took credit for 35 bombings against such targets as the U.S. Capitol, the Pentagon, and corporate buildings.

So in his judgment they lacked intelligence, they needed informants, that it was essential to the safety of the country that they infiltrate this organization.

Mr. RUDOVSKY. There was nothing at the time that prevented them from infiltrating.

Mr. DRINAN. I know, but he would say in the future we have to have this power.

Mr. RUDOVSKY. I would say the FBI can have that power if they can demonstrate to a judge that the organization is involved in ongoing criminal activity. If they could have made that presentation to a judge and persuaded the judge that the organization was involved in criminal activity, they could have gotten a search warrant to search for the fruits of that criminal activity.

I assume under this bill they would be allowed to, through a search warrant or through a warrant, have an informant placed in an organization that is involved with criminal activity.

The point is, when he uses the term "underground organization" in the past, in practice what that has meant is virtually every organization that dissents from the basic policies of this Government.

From the Lawyers Guild to the ACLU to the Institute for Policy Studies—the list is enormous of the kind of organizations the FBI felt were subversive because they didn't agree with the day-to-day policy of the Government at that time.

Mr. DRINAN. I agree with you. This is the finest statement I have seen yet on the ramifications of this thing. For that, I am grateful. I yield back the balance of my time.

Mr. EDWARDS. Thank you, Mr. Drinan.

Under the notification program that the FBI set up for victims of the Cointelpro persecutions, as we call them, they notified Jean Seberg of their actions against her, much to her distress, and we know the rest of the story.

Now, do you find the Justice Department itself too often defending in court improper or illegal actions by the U.S. Government when proper government behavior, as exemplified by what they did in the *Seberg* case, of informing her, proper government behavior would suggest admission of guilt by the Government?

After all, we are talking about the representatives of the people, we are talking about the Justice Department, and then going to the people and settling the differences, going to the aggrieved party and settling the differences.

Do you find that in your cases that there is, shall we say, overrepresentation by the Justice Department in unworthy cases?

Mr. RUDOVSKY. I don't know if I would call it overrepresentation. I will stress again the fact that I think the agents who are accused in civil suits are entitled to representation by counsel and vigorous advocacy.

I do find, however, that when the Government represents those agents, there ought to be in these cases a willingness to look beyond the legal technicality, the statute of limitations, or whatever it may be, and say a wrong has been done to a citizen, the wrong was done by the U.S. Government acting through its agents, and therefore the Government will settle with that citizen.

It doesn't mean the agent will have to pay any damages. The Government itself could settle.

I find an unwillingness across-the-board in these cases to do that. I have been involved in numerous of these actions. These cases have dragged through the courts for years—it is highly technical, it is to delay the trial and the resolution of these cases, it is to prevent the disclosure of documents which are relevant to the civil proceeding.

It is not in a sense bargain in good faith as to what should happen as a result. They do that in part because they know that under *Bivens* and under the law that is developed under *Bivens* there is a very narrow remedy, if at all.

Therefore, they have been successful in the defense of these civil suits to some degree. I only know one where they have settled the matter, to my knowledge. Many others are still pending in court.

Mr. EDWARDS. It seems to me that there should be an examination of the standards used. Where the Government misbehaves against one of its citizens, or a Government agent—certainly the individual agent is entitled to all of the defenses and a defense and a defense lawyer. But the Government itself should confess its sins and make retribution.

I am afraid that in our investigations and inquiries over the years in this subcommittee—and we have been in this business for quite a long time now—we have found a lack of that attitude in the Government.

The *Jean Seberg* case is an exception. It is an ugly case. But it is at least a case where the FBI apparently found out in its own examination of its own files that this wrong had been done and they got in touch with her in the most decent way they could imagine—they didn't want to write her a letter to say what they had done.

I might say Mr. Drinan insisted on this program many years ago when the Cointelpro program first broke and by a vote of this subcommittee we insisted that the first hearing be made public, when a number of members wanted to go into executive session so the FBI and the Attorney General could tell us about Cointelpro.

I remember Mr. Drinan insisting that this kind of program be set up. Do you remember that?

Mr. DRINAN. Thank you. I had almost forgotten that.

Mr. EDWARDS. You don't mind my recalling it.

Mr. DRINAN. No. I am trying to think of a device by which we can force the FBI to do something salutary now about getting adequate civil remedies in this bill.

Thank you very much.

Mr. EDWARDS. I have in front of me the letter that was written by Mr. Webster on December 5, 1978, to Attorney General Bell describing the administrative inquiry that he had made chiefly about one squad of agents in New York, a squad 47, consisting of charges against 50 or 60 or 70 agents who had been engaged in activities relating to the Weather Underground.

They placed wiretaps without judicial warrants, many surreptitious entries, warrantless searches, microphone surveillances, mail openings, et cetera, some of the activities taking place through 1974, and at least one in 1975.

This is later than I had remembered these activities taking place. Actually, I would suppose that some of the internal disciplinary actions taken by the Director would disagree with one of your statements to the effect that insofar as Cointelpro activities were concerned, there hadn't been any discipline because in cases there had been, although they were not Cointelpro, that is right. These were different kinds of investigations.

Mr. EDWARDS. Right. However, in the letter that Director Webster wrote to the Attorney General he points out that there was immense pleasure instituted by the White House and other people expressing dissatisfaction with the intelligence information available regarding domestic organizations.

President Nixon's personal concern for the investigation of extremist groups was conveyed. This intense interest in catching the Weather Underground fugitives at all costs was conveyed by FBI headquarters officials to those in the field responsible for this effort.

Now, this goes to the heart of what we are concerned about, doesn't it, that tomorrow or the next day a crisis or situation can occur in the United States where the White House or the American public or a group of newspapers or whatever would be so concerned about some particular issue, a passion of the moment, shall we say, that his would be conveyed to the FBI, and a great deal of harm could be done, as in this case.

Now, the theory of the charter is there shall be laws against it, right?

Mr. RUDOVSKY. That is correct.

Mr. EDWARDS. We won't have any way of knowing about that, if they do go ahead, although a charter would be a big help.

Mr. RUDOVSKY. The charter hopefully would prohibit that kind of activity. I think what you are pointing to is that without appropriate remedies, if the agents engage in at a time when there is high public tension about a particular issue, or when you don't have the control that you may have today over that agency—Director Webster is not going to be the Director forever, you will have new Presidents, new Directors, and you ought to be anticipating the worst; that if it goes back to the way it was, there ought to be the remedies available to citizens whose rights are violated by the FBI.

Mr. DRINAN. Mr. Chairman, would you yield.

A law enforcement group that I was talking to the other day posed this hypothetical. One of them was an FBI agent. He said suppose they had rumors that a group of very angry American citizens are going to capture and keep hostage 50 Iranians in this country. There was a rumor and the FBI received a report of this.

Would the law enforcement agency say, should we just sit back until we have probably cause or should we go with informants and agents and simply listen to these students or these other people, talk to them, find out. Shouldn't we somehow anticipate that this might happen.

Mr. RUDOVSKY. Well, I think they should anticipate it. I think they have got a number of techniques available to them. Assuming

the hypothetical they give you, somehow they have gotten some information this may occur. If that information came from a reliable source—

Mr. DRINAN. It didn't. It came from an anonymous caller. But they go and talk to people in a Western State and people have been thinking about it. A small group they found out by surveillance have in fact, I won't say plotted, but they have thought about it. They feel it is very important that they keep very close to this particular place.

Mr. RUDOVSKY. I think there are ways of keeping close on situations, potential trouble spots, without infringing on civil liberties. I don't think you have to invade a person's home, I don't think you have a right to wiretap in that situation, unless you have the cause enunciated under the statute.

If they have the rumor, and if they have more information from other citizens who have come to them and say planning has actually occurred, if they find evidence of that planning in the purchase of materials that would be used in the crime, then you are talking about probable cause.

Mr. DRINAN. They have an informant now. He is a student. They just told him, and he said, yes I will work for you. They said under the standards proposed by the ACLU and the National Lawyers Guild it would be impossible to get probable cause, we have no probable cause. Yet we know as law enforcement people we should be close to it.

Mr. RUDOVSKY. Assuming there is no probable cause, I don't think they have a right to put the informant in that organization. Let me tell you why.

You obviously reach for the most dramatic kind of hypothetical. I am not denying that couldn't occur, but that has been used in the past to infiltrate every organization in this country that dissented from Government policy.

I represented the Institute for Policy Studies, a Washington-based group here investigated by the FBI for 6 years based on the rumor in 1968 that someone from the Weather Underground had stayed at their organizational headquarters overnight one day.

That led to a 6-year investigation, 50 informants, the FBI renting an apartment across the street from IPS and taking pictures of everybody who walked in and out. In 1968 everybody was concerned about the Weather Underground.

If IPS was secreting a fugitive there, you had the same kind of reaction. The point was that information was not verifiable, it was not true. Yet, the FBI thought justified at that time, given the public concern about the Weather Underground, to infiltrate IPS.

I don't know what kind of group you are talking about out in the West. If you find criminal activity you can move. If you cannot, the Constitution restricts it. I don't think we should make exceptions for the very hard cases because that exception tends to swallow virtually every kind of dissent in this country.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. I was going to observe in the present crisis over Iran and the hostages we haven't had the usual American excesses, although there are some trends that we who are interested in civil liberties don't approve of.

It is a little bit of an indication of what can happen if we had perhaps somebody else in the White House, with singling out 30,000 or 40,000 Iranian students and insisting that they report, but no other students.

I am sure that that distressed you as it did a number of us. That perhaps is the only instance where there has been an alleged and very probable violation of constitutional rights in this particular crisis, but it is an indication of what can happen.

Mr. RUDOVSKY. Yes; it is.

Mr. EDWARDS. We will recess for 10 minutes while there is a vote. If you don't mind waiting, we have a few more questions.

Mr. RUDOVSKY. Sure.

[Brief recess.]

Mr. EDWARDS. The subcommittee will come to order.

Counsel?

Ms. LEROY. Mr. Rudovsky, why in your view aren't the proposed amendments to the Federal Court Claims Act an adequate response to the kinds of problems you have been talking about?

Mr. EDWARDS. I think for two reasons. Let me preface that by saying there is no assurance that the amendments would pass, so there would be great risk to pass an FBI charter without a remedy on the assumption that at some future time the Tort Claims Act would pass.

So I preface what I am going to say by noting that. But even if it did pass, the Tort Claims Act as proposed, the amendments, would limit liability to violation of constitutional rights again.

Therefore, as I mentioned before, the defamation of Jean Seberg, the physical surveillance of political activists, the trash covers, the informants in political organizations, all those to date have not yet been considered by the Supreme Court to be a constitutional dimension and therefore would be no remedy.

In addition, as I read the proposed amendments, they would make the Government liable with no mandatory action against the agents who committed the act.

Now, again, we have no problem with the Government assuring that a judgment is paid. However, it seems to us that if a remedy is going to have any kind of deterrent effect, it is going to have some bite against the agent who intentionally violates the law.

If that is internal discipline, fine. An internal fine, demotion, whatever. But unless there is that possible remedy in tandem with a judgment, we think it is adequate.

Ms. LEROY. If adequate remedies were put into the charter, would you think of exempting the Bureau from the Federal Tort Claims Act amendments, assuming that they are passed?

Mr. RUDOVSKY. I would assume that the remedies would be somewhat redundant then. If the adequate remedies were incorporated in the charter—that is, the agent and the agency would both be liable—I am not sure you would need them covered under the Tort Claims Act. I would have to think that through a little bit more, however.

Ms. LEROY. Ms. Imholz cited the Foreign Intelligence Surveillance Act and also the Omnibus Crime Control Safe Streets Act as possible models for a remedy in the charter. Do you agree that those taken together might serve as adequate models, or are there gaps or problems that would not be covered by those types of remedies?

Mr. RUDOVSKY. I think they would be a good start. My concern is that both of those statutes involve only one kind of law enforcement technique, wiretapping, and the remedy is tailored to meet that kind of violation.

I think it was pretty easy to draw a remedy. If you were wiretapped illegally, then there should be liquidated damages and possible punitive damages and attorney fees. I think that is an appropriate sanction for that kind of violation.

Here the problem gets a little more complex because we are talking about an entire level or levels of possible violations of a rather complex charter. I think the principle that there be liquidated damages, that there be possible punitive damages for malicious activity, that there be attorney fees, is a good place to start.

I would have no objections to that, but I think a little more thought has to be given as to the kind of violations that ought to be compensated in the first place. I think what we are really talking about are those violations—I don't like the word substantial violations.

I think a violation of virtually any aspect of this legislation, where we are talking about intrusive government techniques, a violation of the restrictions on those, any kind of violation of political activity under the first amendment, is almost by definition substantial in my view.

So I think it ought to be any violation of the statute. If it happens to turn out that that violation is *de minimus*, No. 1, I don't think a suit is going to be brought and, No. 2, if it is, the damages would reflect that fact.

So, I think it is a kind of process of works which eliminates frivolous suits in the beginning. I don't know many lawyers who are going to file suits and spend years and years in litigation if the possible remedy down the road is \$100 because a file was kept open 2 days longer than it should have been.

Ms. LEROY. What about the problem of providing injunctive relief, which I assume you favor. Is there a problem in terms of using injunctive relief to disrupt legitimate ongoing investigations? Is the fear of the Bureau that organized crime figures, for example, are going to use a civil remedy to inhibit FBI investigations?

Mr. RUDOVSKY. I don't share that fear for two reasons. No. 1, notwithstanding the limitations of *Bivens* as to damage actions currently, there have been and there can be suits against the FBI now for injunctive relief for illegal ongoing governmental activity.

For example, I will refer again to the IPS litigation, where basically what was sought in that case, when it was first filed, was an injunction, because at that point the investigation was ongoing, against any future investigation unless there was shown to be a criminal predicate for that investigation.

So I think even now under current law you can have that. If in fact the investigation that you are talking about is a legitimate one, no court is going to interfere with that. They are not going to enjoin a legitimate criminal investigation.

If, however, it is not a legitimate investigation, then I think that can be as important as the damage aspect. It seems to me to be inconsistent to say, well, wait 5 years until we are done with this investigation, and then we will give you damages for any rights we may

violate during that time, as opposed to saying at the time you find out about it, stop it now, I don't want to take a chance of proving damages or not down the road when I can show at this point, and there is a pretty high burden in that kind of suit, that there is illegal activity ongoing now.

Mr. EDWARDS. I think that we are going to have to draw this very useful set of hearings to a close, because there is a vote on the floor and I won't be able to come back. At this time we will make a record that we can ask you some questions in writing, or we will make them a part of the record if any counsel have further questions.

But your statement, as Father Drinan said, was really excellent. We thank you very much for making a large contribution to our work.

Mr. RUDOVSKY. Thank you for the opportunity.

Mr. EDWARDS. We will adjourn at this time.

[Whereupon, at 11:30 a.m. the subcommittee adjourned.]

# LEGISLATIVE CHARTER FOR THE FBI

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THURSDAY, FEBRUARY 7, 1980

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 9:35 a.m., in room 2226, of the Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Representatives present: Edwards, Seiberling, Drinan, Volkmer, Hyde, and Sensenbrenner.

Staff present: Thomas P. Breen, counsel; Janice Cooper, assistant counsel; and Thomas Boyd, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we're continuing our hearings on H.R. 5030 which is the proposed charter for the FBI. Today we are going to examine the proposal authorizing the FBI to request members of the clergy to act as informants. This provision is contained in section 533B and has caused considerable comment by a wide range of religious organizations.

Before I introduce today's witnesses, I would like to make a part of the record a letter dated February 6, 1980, from 14 representatives of the widest range of religious groups opposing this particular provision of the charter. All the members have a copy in their folders. Without objection it shall be a part of the record.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. I have no comment, Mr. Chairman.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I just want to thank the witnesses for coming. I look forward to their testimony. I think it's a very important issue and I thank the chairman for bringing about this hearing.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Nothing, Mr. Chairman, at this point.

Mr. EDWARDS. I wonder if the following witnesses would come to the witness table: William P. Thompson, stated clerk of the general assembly, United Presbyterian Church in the United States of America; Rev. Dean Kelley, associate for religious and civil liberties, division of church in society, National Council of Churches; Jeri Hamilton, program assistant, department of law, justice and community relations, board of church and society, United Methodist Church.

**TESTIMONY OF WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA; DEAN KELLEY, ASSOCIATE FOR RELIGIOUS AND CIVIL LIBERTIES, DIVISION OF CHURCH IN SOCIETY, NATIONAL COUNCIL OF CHURCHES; DAVID SAPERSTEIN, DIRECTOR, COUNSEL, RELIGIOUS ACTION CENTER, CENTRAL CONFERENCE OF AMERICAN RABBIS, COMMISSION ON SOCIAL ACTION FOR REFORM JUDAISM; JERI HAMILTON, PROGRAM ASSISTANT, DEPARTMENT OF LAW, JUSTICE AND COMMUNITY RELATIONS, BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH**

Mr. EDWARDS. Rabbi David Saperstein is not here yet. He will be here in a moment and will proceed to the table.

Who wants to be first?

Mr. THOMPSON. I will go ahead, Mr. Chairman.

Mr. Chairman and members of the committee, my name is William P. Thompson. I am stated clerk of the general assembly of the United Presbyterian Church in the United States of America. This church is a Protestant denomination that numbers more than 2.5 million active members in some 8,700 congregations in all 50 States, the District of Columbia, and Puerto Rico. The denomination's headquarters and my office are at 475 Riverside Drive, New York, N. Y.

I am a lawyer and practiced that profession for more than 20 years before being elected to the office I now hold. The stated clerk is the chief executive of the general assembly of the United Presbyterian Church. This assembly meets annually and is composed of representatives, one-half ministers and one-half lay officers, known as ruling elders. These representatives called commissioners are active members of the church elected by the 152 presbyteries of the denomination.

The general assembly is the highest governing body of the church and has legislative, executive, and judicial powers. My testimony today is based upon actions of the general assembly taken in its annual meetings. I am therefore expressing the views of the highest representative governing body of the church, with which some members of the church may differ.

I do not purport to speak for all of the members of the church. I speak for the highest representative governing body of the church.

I appreciate this opportunity to comment on H. R. 5030 which would enact a charter for the Federal Bureau of Investigation. That effort is in itself commendable. Many citizens rely upon adoption of a proper charter to assure that recent abuses will not be repeated and that their civil liberties will be protected in the future.

I wish to indicate that the United Presbyterian Church is a member of the National Council of Churches of Christ in the United States of America, the testimony of which will be given by Dr. Kelley, shortly. The United Presbyterian Church has participated in the determination of the policy statements which form the basis of his testimony, and I therefore indicate our support of the positions which that council has taken, as well as the particular positions which the general assembly of the United Presbyterian Church has taken.

I do not intend to comment on the entire bill. Nevertheless, I do wish to express appreciation for the principle, basic to the proposal before you, that investigations conducted by the Federal Bureau of Investigation "shall be concerned only with conduct and only such conduct as is forbidden by a criminal law of the United States or State criminal law pertaining to investigation of terrorist activity."

This principle is reinforced by the limitations that the Federal Bureau of Investigation "shall not conduct an investigation solely on the basis of a religious or political view lawfully expressed by an individual or group," or "the lawful exercise of any other right secured by the Constitution or laws of the United States," including the rights of assembly and petition.

However, the provisions to assure that these limitations will be observed should be strengthened.

There are certainly other principles expressed in the proposed legislation, to which we take no exception.

My purpose in accepting your invitation to appear today is to express the deepest concern regarding the provisions of the bill relating to the utilization by the Federal Bureau of Investigation of practicing members of the clergy as informants or undercover agents. I refer specifically to section 533b(b)(3) which pertains to such utilization of physicians, attorneys, and news reporters as well as members of the clergy, the very categories of professionals who are granted the privilege of confidential communications by the laws of virtually every United States jurisdiction.

While we contend that the scope of privileged communications with all of these persons would be expanded rather than curtailed, we are particularly concerned about communications with members of the clergy.

The confidentiality of communications with the clergy, whether in the confessional or at the counseling desk, must be maintained if the minister, priest, or rabbi is to be able to perform the religious and spiritual functions required by the community of faith of that person.

We have noted that the bill requires express authorization in writing by the Director of the Federal Bureau of Investigation or his designee, and notification to the Attorney General or his designee before one of the persons listed can even be requested to act as an informant. Moreover, the bill requires that "the person must be advised that in seeking information from him, the Federal Bureau of Investigation is not requesting that person to breach any legal obligation of confidentiality which such person may be under."

We consider these provisions to be totally inadequate.

The earlier provisions require administrative authorization by the very agencies of the executive branch seeking to make the investigation. Surely to be an effective curb on improper activity would require scrutiny by another branch.

The latter provision places the burden of determining whether or not a particular communication is privileged upon the potential informant. In our view, this is an improper requirement to impose upon the clergy. In many jurisdictions the scope of the privilege granted to communications with a member of the clergy is not clearly defined. Hence, the question of whether or not particular information is protected is almost certain to become a matter of controversy in which the individual member of the clergy is pitted against the Bureau.

Moreover, when the clergy are open to the request that they become Federal Bureau of Investigation informants, many individuals in need of their spiritual and religious services will be dissuaded from communicating with them for fear that what they believe to be confidential communications will be subject to possible transmittal to the Federal Bureau of Investigation. The very existence of that possibility will, in our judgment, have such a chilling effect on the work of the clergy as to constitute an abridgment of the free exercise of religion.

General assemblies of the United Presbyterian Church have expressed, relevant to your present considerations, concerns in two areas of social policy regarding which they have adopted statements: one, the relations between church and state; and two, the preservation of privacy.

The 175th general assembly, meeting in May 1963, adopted a statement on relations between church and state in this country that observed:

The church can never become so enmeshed in the society that it conforms and becomes unidentifiable as a church. In the heritage of separated church and state the matter can be sharply formulated; not only must each maintain a distinct identity but the church must be itself if the state is to be a state.

Although the protection of privileged communications with members of the clergy was not one of specific aspects of church-state separation addressed by that far-reaching statement, its total thrust is certainly against the blurring of distinctions between clergy in their roles as pastors, priests, or ministers on the one hand, and their possible roles as informants or undercover agents for a governmental investigatory agency on the other.

Then years later the 185th general assembly, in 1973, approved a statement concerning privacy. Among its applicable provisions are these:

We urge Presbyterians, and indeed all people, to be vigilant about preserving privacy and constantly to assert for themselves and others their right to be free from unjustified invasions of privacy.

It seems inescapable that utilization of members of the clergy as Federal Bureau of Investigation informants would be a potential invasion of the privacy of those persons who communicate with them when seeking spiritual, religious counseling and other services which clergy are called upon to provide, persons who generally rely upon a belief that the legal privilege of confidentiality is inviolate.

The same general assembly statement continues:

In law enforcement we call for procedures at all levels of government to require judicial approval and supervision of the use of informers who establish or maintain a relationship for the purpose of informing in civil or criminal investigations.

The important operative word in this general assembly action is obviously "judicial," but the proposed Federal Bureau of Investigation charter has no provision for judicial safeguards in the section under discussion. Rather, the bill depends upon the very agency of the executive branch seeking to undertake the investigation to approve the use of clergy as informants through administrative procedure.

Indeed, I doubt that the general assembly in using this safeguard even considered the possibility that its clergy might be called upon to act as informers.

The general assembly then turned to more detailed considerations, stating:

As regards domestic surveillance by civil law enforcement agencies, we urge that legitimate surveillance be precisely defined by law, that surveillance be administered by personnel under court supervision, and that severe criminal penalties be established for illegal surveillance.

We urge church people to work for the adoption of more adequate statutes to protect the confidentiality of pastoral communications, and in the absence of such protection to resist divulging such confidences, even to the extent of enduring imprisonment for contempt.

Thus, as early as 7 years ago, the general assembly of the United Presbyterian Church adopted as its policy resistance to those pressures which would breach the confidentiality of pastoral communications, even to the point of citation and imprisonment for contempt.

The assembly did not consider the possibility that legislation permitting the use of clergy as informants, such as the bill before you today, would ever be proposed. In my opinion this concept would have been unacceptable then as it surely is today.

In the fall of 1975, highly placed persons in the executive branch of our Government confirmed and attempted to justify extensive contacts by the Central Intelligence Agency with American missionaries and with foreign clergy abroad. The 188th general assembly, meeting in the summer of 1976, addressed this matter directly.

Although you are not considering a charter for the Central Intelligence Agency in today's hearing, that 1976 statement made observations which are as relevant to domestic clergy, those affected by the bill before you, as to missionaries and clergy abroad.

That statement called for an immediate stop to intelligence gathering for American missionaries and foreign clergy because:

Trust and confidence are central to any mission relationship. Church bodies overseas have the right to expect that the relationships of United States religious personnel to those churches will be solely at the service of a common Christian mission and will not be used in any way for intelligence gathering purposes of any government.

The United Presbyterian Church is as committed to the separation of church and state in this country as it is to such separation overseas. We believe that trust and confidence are central to any relationship of clergy with persons who seek their services here at home as well as abroad.

On the foundation of the general assembly actions to which I have alluded, I urge you to delete from this legislation all provisions for the use of clergy—and to that I would add physicians, lawyers, and journalists—as informants or undercover agents for the Federal Bureau of Investigation or any other agency of the U.S. Government. Perhaps in your further consideration of the legislation, you will consider it necessary to enact a prohibition of such utilization of the clergy altogether. Thank you.

Mr. EDWARDS. Thank you very much, Mr. Thompson, for a very strong statement.

Our next witness—I believe it's your wish that it would be Dean Kelley.

But before you begin, Dr. Kelley, we welcome to the witness table Rabbi David Saperstein, director, counsel, Religious Action Center, Central Conference of American Rabbis Commission on Social Action for Reform Judaism.

Dr. Kelley.

Reverend KELLEY. Thank you. My name is Dean M. Kelley, and I am the executive for religious and civil liberties of the National Council of the Churches of Christ in the U.S.A., which is the cooperative agency of 32 national religious bodies—Protestant and Orthodox—having an aggregate membership of approximately 40 million in the United States.

I do not pretend to speak for all of those constituents, but for the governing board of the National Council of Churches of Christ, which is composed of 265 persons chosen by the several member denominations according to their own respective methods and in proportion to their size.

After the recent revelations of the array of "dirty tricks" in which the Federal Bureau of Investigation was engaged during the years of Cointelpro, the Nation had reason to expect a housecleaning and a charter for the FBI that would clearly prohibit the recurrence of "black bag jobs," agents provocateurs, anonymous vilifications of organizations and individuals—such as happened to Martin Luther King, Jr.—and all the other unworthy tactics we now know to have occurred.

The FBI Charter now before Congress does not at all prohibit the kinds of victimization that aroused the outcry for responsible oversight and control by Congress of a powerful law enforcement agency that had become a law unto itself.

It does not specify that the FBI shall not send forged letters denouncing or discrediting persons or organizations which it dislikes. It does not prohibit the FBI from implating or employing secret informants or infiltrators, who will not only supply information but will try to incite otherwise noncriminal persons or groups to perform criminal acts, even providing them weapons and other means to do so.

It does not prevent FBI agents from masquerading as reporters, attorneys, or clergy in order to obtain confidences erroneously believed to be privileged—which will be the main burden of this testimony.

In short, it does not do precisely what a long-awaited FBI Charter ought to do: Reform the mandate of a misbehaving Federal agency.

Since this item was written, certain events have occurred which may have served to sensitize Members of the Congress to abuses which other parts of the population had earlier experiences, such as trial in the press, prior to any grand jury indictments.

In the next section I refer to the same events that Mr. Thompson has mentioned—that is, the revelations that the CIA was using foreign missionaries of domestic churches as informants, and intended to continue to do so.

The executive committee of the National Council of Churches meeting in December 1975, took an action insisting that such CIA and other U.S. Government intelligence-gathering from American missionaries should stop immediately.

Then I recite the reactions of a number of denominations, including Mr. Thompson's and two others that are members of the national council; then actions of three bodies that are not members of the National Council of Churches, all pertaining to the CIA use of foreign missionaries.

Mr. EDWARDS. All this will be printed in the record, without objection.

Reverend KELLEY. Thank you. Then in section III I attempt to relate that to the domestic legislation concerning the FBI.

This history is related not only because there is further upstream a CIA Charter on its way down via the same channels, but because it illuminates our concern that there is no prohibition in the FBI Charter against the similar use of clergy in this country as informants, agents, or delators.

It may be asked whether the foregoing strictures against Government misuse of missionary personnel abroad in espionage apply to domestic use of clergy in the detection of crime and apprehension of criminals. Our answer is that in many respects they do.

It should be readily apparent that a missionary abroad will be useless as a missionary if he/she is suspected of being a covert agent of the CIA. Not only will his/her life and security be jeopardized, but the persons to whom he/she hopes to minister will view him/her with suspicion and aversion rather than with confidence and trust, and the religious mission will then be rendered futile.

This has nothing to do with whether the missionary is patriotic or concerned for his/her own nation's interests. The missionary may be the most patriotic person in the world, but cannot functionally be both a missionary and an espionage agent. The two roles are incompatible, if not antithetical.

This is not to pass ethical judgment upon the espionage role. It may be justifiable and necessary. But it cannot be performed by missionaries without impairing the mission, not only of the individual missionary involved, but of all missionaries.

That is why it is not sufficient for the various churches which are concerned about this abuse and see its future perils to forbid their own missionaries to act as spies, but the Government itself must forswear the use of any missionaries in its espionage roles, or even having its own agents represent themselves as missionaries, lest the entire profession be tainted. It must not only be free of diversion to espionage purposes, but be seen to be free of such diversion.

The same condition holds at home. Clergy and other church workers have their own essential work to do, which depends heavily upon a relationship of confidence and trust between the religious minister and those who need his or her ministrations.

If the clergyperson is seen as a potential FBI informant, the necessary relationship of confidence and trust is broken, and the potentially redemptive ministry ended.

As is often asked about such ministries, why should the church or its members have anything to hide? They certainly do not condone crime or wish to frustrate the apprehension of criminals. Why then should they resist doing anything they can to aid the forces of law and order?

The churches do indeed uphold law and order, but they are not themselves law enforcement agencies, nor the tools of such agencies. To be such, or even to be thought to be such, would mean the end of their access to all but those who have no sins to confess.

One of the best-attested reports about the Founder of our Faith was that he was often criticized for associating with sinners, but he answered, "Those who are well have no need of a physician, but those who are sick; I have not come to call the righteous, but sinners to repentance."

If churchworkers are doing what their Master wanted them to do, they will be reaching out to help the least and the lost, sinners and

malefactors, those whom society often thinks of as rebels and outcasts, to find redemption. But they will reach out in vain if they are thought to be a front for the FBI.

But does that mean that crimes will go unpunished? It may. But that choice was made some time ago when the law in many jurisdictions recognized the inviolability of the "seal of the confessional" or the priest-penitent privilege. A clergyperson cannot be required to divulge in court information he or she has obtained in confidence from a penitent confessing his or her sins, and indeed many clergypersons have gone to jail rather than divulge such confidence when, for various reasons, the evidentiary privilege was denied.

The reason is that the cure of souls is more important to the church than the apprehension of a particular criminal, and the cure of souls cannot take place without the confession of sin. And since some sins may also be crimes, they cannot be confessed if the person hearing the confession can be compelled to divulge them, and the cure of souls is thus rendered impossible.

The cure of souls is also more important to the civil law than the apprehension of a particular criminal, or there would not be such a privilege in the civil law.

As Wigmore wrote in "Evidence," a privilege is recognized when the relationship it safeguards is seen to be of greater importance to society than any particular evidence that might be obtained by overriding it.

Similar privileges of confidentiality have long been recognized in the relationship of lawyer and client, and in some jurisdictions, of physician and patient or of husband and wife.

A similar privilege has been claimed by the press to protect their confidential sources—unsuccessfully as yet, it seems from *Bransburg v. Hayes*, but nonetheless of great importance to an informed society.

Several friend-of-the-court briefs have been filed by the general counsel of the National Council of Churches in cases involving privileges of confidentiality claimed by churchworkers, some of whom were not ordained or did not qualify for the rather narrow legal privilege recognized in certain jurisdictions.

In those briefs, the NCC has asserted that the priest-penitent privilege affords legal recognition of the civil importance of the relationship of confidence and trust without which the religious organization cannot function, but that it is the core, not the circumference, of that privilege, and that it should be available to all church workers, not just to the clergy, and should cover observations as well as communications, and confidences other than formal, sacramental confessions.

We are seeking in this testimony likewise to safeguard that relationship of confidence and trust from impairment by governmental action.

The legislation before you purports to deal with this problem in the language quoted here, but this provision in no way solves the problem. Presumably any clergyperson aware of his or her professional responsibilities can and will refuse to breach any legal obligation of confidentiality when approached by the FBI, whether this proviso is enacted or not. In fact, some have refused to breach what they believed to be a professional obligation of confidentiality which a court did not consider to be legal, and have gone to jail rather than betray such a confidence.

The problem is not that clergypersons may feel pressured by the FBI to divulge a confidence, but that the clergy as a class or pro-

fession will be seen as fair game for recruitment by the FBI as informers against the very persons they are supposed to be trying to reach and help—sinners, who in a few instances may be criminals.

Yet it is not just the penitent person guilty of a crime who would be warned away from a professional known to be potentially an informant for the FBI, but also a much wider class of people who need the cure of souls—oppressed minorities, dissident groups, society's losers, rebels, outcasts, who may have committed no crimes, but who do not relish the attention of any governmental agency.

I then refer to an observation by our governing board that the FBI has used its powers in the past to harass and intimidate political dissidents in the numerous movements listed there.

And the governing board observed that:

Congress has never given the Federal Bureau of Investigation subpoena powers, yet agents today routinely threaten uncooperative persons with subpoenas from a grand jury, and often indeed serve such subpoenas upon them.

This suggests that the governing board would recommend that Congress not empower the FBI to serve investigative demands or administrative summons or other compulsory process.

In that same resolution, the governing board set forth a list of policies that its staff employees should follow if approached by Government investigators, including the CIA, FBI, et cetera, designed to protect the integrity of the church as an institution and of its employees as servants of Jesus Christ and of no other master.

And I cite some of those policies there; and the last paragraph indicates that churches realize that, in so advising their employees, they risk citations for contempt of court in their effort to establish judicial recognition of the churches' right not to breach the relationship of confidence and trust which is essential to the functioning of the religious community.

I might add that that paragraph was offered by a member of the board as an amendment designed to discourage the resolution as a whole. And it was adopted unanimously by the board, recognizing that that was a risk that religious personnel must run.

In conclusion, I suggest that instead of the present section, we would recommend the substitution of language such as the following—at least in reference to the clergy; the other professions mentioned can speak for themselves, and I suggest that it read:

The FBI may not request any person under any obligation of legal privilege of confidentiality, such as a clergyperson or other full-time churchworker in the employ of a church, a church agency, or convention or association of churches, to collect information as an informant under any circumstances.

And then add this:

The FBI may not assign or require its employees to misrepresent themselves as members of the clergy or churchworkers, nor may it establish, undertake or operate a proprietary purporting to be a church or church agency.

In asking that the churches and their employees be placed off limits for the FBI as informants, we do not wish to imply or suggest that they are otherwise outside the law or relieved of the general responsibility of all citizens to uphold the laws and to assist in the prevention of crime and the apprehension of criminals.

A clergyperson who is walking down the street and sees a robbery is under the same obligation to report the crime and to testify about it as

any other citizen would be. And certainly churches and their employees have as much right as anyone to call on the FBI for assistance in preventing, resisting, or punishing crime as any other citizens.

All that is sought here is to rule out the use by the FBI, or even the appearance of use, of the church or churchworkers as instruments of law enforcement. That seems a small and reasonable thing to ask, and one that will redound to the benefit, not only of those in need of the cure of souls, but of society in general.

Thank you for the opportunity to present this testimony.

[The complete statement follows:]

**TESTIMONY ON THE "FBI CHARTER" (S. 1612/H.R. 5030) SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS**

**SUMMARY OF TESTIMONY**

1. The "FBI Charter" does not explicitly prohibit many of the illicit practices of the FBI that led to a demand for such a charter.
  2. It does not forbid the FBI to utilize clergy or church workers as informants.
  3. The mere suspicion that clergy or church workers may be informants for the FBI would be sufficient to impair their important role in the "cure of souls."
  4. The "cure of souls" is of civil importance to society, and should be safeguarded by civil law from impairment by governmental action.
  5. The "FBI Charter" should read at Section 533b (b) (3): "The FBI may not request any person under any obligation of legal privilege of confidentiality . . . to collect information as an informant under any circumstances."
  6. It should also provide: "The FBI may not assign or require its employees to misrepresent themselves as members of the clergy or church workers, nor may it establish, undertake or operate a proprietary purporting to be a church or church agency."
  7. This does not mean that clergy may not volunteer nonconfidential information about a crime to the FBI, or call upon the FBI for assistance in preventing, resisting or punishing crime.
- My name is Dean M. Kelley, and I am the executive for religious and civil liberties of the National Council of the Churches of Christ in the U.S.A., which is the cooperative agency of 32 national religious bodies—Protestant and Orthodox—having an aggregate membership of approximately 40 million in the United States. I do not pretend to speak for all of those constituents but for the Governing Board of the National Council of the Churches of Christ which is composed of 265 persons chosen by the several member denominations according to their own respective methods and in proportion to their size.

**I**

After the recent revelations of the array of "dirty tricks" in which the Federal Bureau of Investigation was engaged during the years of Cointelpro, the nation had reason to expect a housecleaning and a charter for the FBI that would clearly prohibit the recurrence of "black bag jobs," agents provocateurs anonymous vilifications of organizations and individuals (such as happened to Martin Luth King, Jr.) and all the other unworthy tactics we now know to have occurred.

The "FBI charter" now before Congress does not at all prohibit the kinds of victimization that aroused the outcry for responsible oversight and control by Congress of a powerful law-enforcement agency that had become a law unto itself. It does not specify that the FBI shall not send forged letters denouncing or discrediting persons or organizations which it dislikes. It does not prohibit the FBI from implanting or employing secret informants or infiltrators, who will not only supply information but will try to incite otherwise non-criminal persons or groups to perform criminal acts, even providing them weapons and other means to do so. It does not prevent FBI agents from masquerading as reporters, attorneys or clergy in order to obtain confidences erroneously believed to be privileged (which will be the main burden of this testimony). In short, it does not do precisely what a long-awaited "FBI Charter" ought to do: reform the mandate of a misbehaving federal agency.

## II

The churches have been especially concerned about the misuse of their clergy for law-enforcement purposes by federal intelligence agencies. In 1975 they discovered that the Central Intelligence Agency had been using missionaries and clergy abroad as intelligence sources. In a letter by Philip Buchen, President Ford's counsel (released by Senator Mark Hatfield December 12, 1975), the following statement appears:

"The President does not feel it would be wise at present to prohibit the CIA from having any connection with the clergy . . . . Clergymen throughout the world are often valuable sources of intelligence and many clergymen, motivated solely by patriotism, voluntarily and willingly aid the government in providing information of intelligence value." (Letter dated Nov. 5, 1975.)

William E. Colby, then Director of the CIA, wrote in a letter dated Sept. 23, 1975:

"In many countries of the world, representatives of the clergy, foreign and local, play a significant role and can be of assistance to the United States through the CIA with no reflection upon their integrity or their mission."

The churches objected immediately and vehemently. The Executive Committee of the National Council of the Churches of Christ, meeting on December 19, 1975, took an action insisting that "such CIA and other U.S. government agency intelligence gathering from American missionaries and foreign clergy should stop immediately" . . . .

Many of its member denominations wrote into their policies stern prohibitions against their missionaries serving as agents of national intelligence-gathering:

1. The 188th General Assembly of the United Presbyterian Church in the U.S.A.:

"Affirms its conviction that it is inconsistent with the understanding of missionary responsibility to the church . . . that any United Presbyterian-related personnel should engage in intelligence gathering activities of the Government of the United States or of any other nation."

Dr. J. Oscar McCloud, Director of the Program Agency of that denomination, which sends and supervises its many missionaries, announced on Jan. 5, 1976:

"Should it come to our attention that any of our missionaries have any relationship to U.S. intelligence agencies, we would feel compelled to terminate the particular missionary for the welfare of our total missionary endeavor and for the sake of the witness of the Christian community to which the missionary is related."

2. The quadrennial General Conference of the United Methodist Church, meeting in Portland, Oregon, in May, 1976, adopted this statement:

"We affirm the action of the leadership of the Board of Global Ministries in December, 1975, who declared that missionaries of the United Methodist Church are servants of Jesus Christ and under the separation of church and state are not agents of any government, repudiated the use by the CIA of missionaries and church personnel of other countries in its intelligence gathering, and declared it inconsistent with our understanding of the universal Church of Christ that the Board of Global Ministries should maintain personnel known to be intentionally engaged in the intelligence gathering activities of the CIA."

3. The Handbook for Overseas Personnel of the United Church Board for World Ministries (United Church of Christ) states in its 1975 edition on page 12:

"Missionary personnel should be constantly aware that trust and confidence are central to any mission relationship. Any involvement that might lessen the confidence of their Christian partners regarding their integrity, discretion and Christian loyalty should be avoided. Specifically, any connection with espionage agencies, such as the CIA, of any government must be completely avoided."

Several churches which are not members of the National Council of Churches took similar positions.

4. The Missionary Handbook of the Christian and Missionary Alliance (dated September 1976) states:

"Missionaries on furlough or overseas are not permitted to function as sources for any intelligence gathering agency of their own or any other government since such actions could identify them . . . as being intelligence agents rather than missionaries of the Gospel."

6. The Roman Catholic Mission Committee of the Conference of Major Superiors of Men, along with the Global Ministry Committee of the Leadership Conference of Women Religious, issued the following statement on November 5, 1975:

"... we deem it necessary to repudiate U.S. Governmental involvement with overseas missionaries for intelligence purposes, be that involvement overt or covert, be it in the host country or in debriefing of furloughed missionaries in the United States. . . .

In addition we would welcome legislation or a stated policy which would prohibit all U.S. Government attempts to utilize overseas missionaries for intelligence purposes."

### III

This history is related not only because there is further upstream a "CIA Charter" on its way down via the same channels, but because it illuminates our concern that there is no prohibition in the "FBI Charter" against the similar use of clergy in this country as informants, agents, or delators. It may be asked whether the foregoing strictures against government misuse of missionary personnel abroad in espionage apply to domestic use of clergy in the detection of crime and apprehension of criminals. Our answer is that in many respects they do.

It should be readily apparent that a missionary abroad will be useless as a missionary if he/she is suspected of being a covert agent of the CIA. Not only will his/her life and security be jeopardized, but the persons to whom he/she hopes to minister will view him/her with suspicion and aversion rather than with confidence and trust, and the religious mission will then be rendered futile.

This has nothing to do with whether the missionary is partiotic or concerned for his/her own nation's interests. The missionary may be the most partiotic person in the world, but cannot functionally be both a missionary and an espionage agent. The two roles are incompatible, if not antithetical. This is not to pass ethical judgment upon the espionage role. It may be justifiable and necessary. But it cannot be performed by missionaries without impairing the mission, not only of the individual missionary involved, but of all missionaries.

That is why it is not sufficient for the various churches which are concerned about this abuse and see its future perils to forbid their own missionaries to act as spies, but the government itself must forswear the use of any missionaries in its espionage roles, or even having its own agents represent themselves as missionaries, lest the entire profession be tainted. It must not only be free of diversion to espionage purposes, but be seen to be free of such diversion.

The same condition holds at home. Clergy and other church workers have their own essential work to do, which depends heavily upon a relationship of confidence and trust between the religious minister and those who need his or her ministrations. If the clergy-person is seen as a potential FBI informant, the necessary relationship of confidence and trust is broken, and the potentially redemptive ministry ended.

As is often asked about such ministries, why should the church or its members have anything to hide? They certainly do not condone crime or wish to frustrate the apprehension of criminals. Why then should they resist doing anything they can to aid the forces of law and order? The churches do indeed uphold law and order—even when government agencies prove themselves to be lawless and disordered—but they are not themselves law-enforcement agencies nor the tools of such agencies. To be such, or even to be thought to be such, would mean the end of their access to all but those who have no sins to confess.

One of the best-attested reports about the Founder of our Faith was that he was often criticized for associating with sinners, but he answered, "Those who are well have no need of a physician, but those who are sick; I have not come to call the righteous, but sinners to repentance." (Luke 5:31-32). If church workers are doing what their Master wanted them to do, they will be reaching out to help the least and the lost, sinners and malefactors, those whom society often thinks of as rebels and outcasts, to find redemption. But they will reach out in vain if they are thought to be a "front" for the FBI.

### IV

But does that mean that crimes will go unpunished? It may. But that choice was made some time ago when the law in many jurisdictions recognized the inviolability of the "seal of the confessional" or the priest-penitent privilege. A clergyperson cannot be required to divulge in court information he or she has obtained in confidence from a penitent confessing his or her sins, and indeed many clergypersons have gone to jail rather than divulge such confidences when, for various reasons, the evidentiary privilege was denied.

The reason is that the "cure of souls" is more important to the church than the apprehension of a particular criminal, and the cure of souls cannot take place

without the confession of sin. And since some sins may also be crimes, they cannot be confessed if the person hearing the confession can be compelled to divulge them, and the cure of souls is thus rendered impossible.

The "cure of souls" is also more important to the civil law than the apprehension of a particular criminal, or there would not be such a privilege in the civil law. As Wignore wrote in "Evidence," a privilege is recognized when the relationship it safeguards is seen to be of greater importance to society than any particular evidence that might be obtained by overriding it. Similar privileges of confidentiality have long been recognized in the relationship of lawyer and client, and in some jurisdictions, of physician and patient or of husband and wife. A similar privilege has been claimed by the press to protect their confidential sources (unsuccessfully as yet, it seems from *Branzburg v. Hayes*, 408 U.S. 665 (1972) but none the less of great importance to an informed society).

Several friend of the court briefs have been filed by the General Counsel of the National Council of Churches in cases involving privileges of confidentiality claimed by church workers, some of whom were not ordained or did not qualify for the rather narrow legal privilege recognized in certain jurisdictions. In those briefs, the NCC has asserted that the "priest-penitent privilege" affords legal recognition of the civil importance of the relationship of confidence and trust without which the religious organization cannot function, but that it is the core, not the circumference, of that privilege, and that it should be available to all church workers, not just to the clergy, and should cover observations as well as communications, and confidences other than formal, sacramental confessions. We are seeking in this testimony likewise to safeguard that relationship of confidence and trust from impairment by governmental action.

## V

The proposed legislation purports to deal with this problem (Section 533(b)(3)) by providing that:

"The FBI may request any person under an obligation of legal privilege of confidentiality, including a licensed physician, a person who is admitted to practice in a court of a State as an attorney, a practicing clergyman, or a member of the news media, to collect information as an informant pursuant to this subsection if—

"(A) expressly authorized in writing by the Director or a designated senior official of the F.B.I.

"(B) the Attorney General or his designee is promptly notified of the authorization in writing or an oral notification is promptly confirmed in writing; and

"(C) the person is advised that in seeking information from him, the F.B.I. is not requesting the person to breach any legal obligation of confidentiality which such person may be under."

This provision in no way solves the problem. Presumably any clergyperson aware of his or her professional responsibilities can and will refuse to "breach any legal obligation of confidentiality" when approached by the FBI, whether this proviso is enacted or not. In fact, some have refused to breach what they believed to be a professional "obligation of confidentiality" which a court did not consider to be "legal," and have gone to jail rather than betray such a confidence.

The problem is not that clergypersons may feel pressured by the FBI to divulge a confidence, but that the clergy as a class or profession will be seen as "fair game" for recruitment by the FBI as informers against the very persons they are supposed to be trying to reach and help—sinners, who in a few instances may also be criminals. Yet it is not just the penitent person guilty of a crime who would be warned away from a professional known to be potentially an informant for the FBI, but also a much wider class of people who need the cure of souls: oppressed minorities, dissident groups, society's losers, rebels, outcasts, who may have committed no crimes, but who do not relish the attention of any governmental agency.

The Governing Board, in a recent resolution on "Grand Jury Abuse", May 5, 1977, noted that the FBI had been involved in tactics used "to harass and intimidate political dissidents, including the anti-war movement, the activist student movement, the Native American movement, the Black movement, the trade-union movement, the Catholic peace movement, the feminist movement. . . , the Chicano and Puerto Rican movements."

It added that "Congress has never given the Federal Bureau of Investigation subpoena powers, yet agents today routinely threaten uncooperative persons with subpoenas from a grand jury, and often indeed serve such subpoenas upon them." (This suggests that the Governing Board would recommend that Congress not empower the FBI to serve "investigative demands" or administrative summonses or other compulsory process.)

The Governing Board then set forth a list of policies that its staff employees should follow if approached by government investigators, including the CIA, FBI, etc., designed to protect the integrity of the church as an institution and of its employees as servants of Jesus Christ and of no other master.<sup>1</sup> Some of these policies are:

"That, if and when any employee of a church or church agency is approached by government investigators (on matters related to that church or agency), the inquiry be handled by the senior officer available (with appropriate legal advice);

"That churches and ecumenical agencies not divulge names of contributors, members, constituents, or any persons or groups with whom they have been working in a relationship of confidence and trust;

"That churches and ecumenical agencies not divulge, without benefit of legal counsel and consent of persons concerned, personnel files, correspondence or other confidential and/or internal documents or information;

"That churches and ecumenical agencies inform any persons in their employment or membership about whom inquiries have been made that such investigations are in process;

"That churches and ecumenical agencies make particular provision to insure and protect the freedom of association and exercise of advocacy by members and staff in their ministries and relationships with social action agencies and oppressed and alienated groups;

"Churches which adopt the above recommendations should be aware that they, or their members, may be faced with the risk of civil penalties, including citations for contempt of court, in their effort to establish judicial recognition of the church's right not to breach the relationship of confidence and trust which is essential to the functioning of the religious community."

## VI

Instead of the present Section 533b(h)(3), we would recommend the substitution of language such as the following (at least in reference to the clergy; the other professions mentioned can speak for themselves):

"(3) The FBI may *not* request any person under any obligation of legal privilege of confidentiality, such as a clergyperson or other full-time church worker in the employ of a church, a church agency, or convention or association of churches, to collect information as an informant under any circumstances.

"The FBI may not assign or require its employees to misrepresent themselves as members of the clergy or church workers, nor may it establish, undertake or operate a proprietary purporting to be a church or church agency.

In asking that the churches and their employees be placed "off limits" for the FBI as informants, we do not wish to imply or suggest that they are otherwise "outside the law" or relieved of the general responsibility of all citizens to uphold the laws and to assist in the prevention of crime and the apprehension of criminals. A clergyperson who is walking down the street and sees a robbery is under the same obligation to report the crime and to testify about it as any other citizen would be. And certainly churches and their employees have as much right as anyone to call on the FBI for assistance in preventing, resisting or punishing crime as any other citizens. All that is sought here is to rule out the use by the FBI, or even the appearance of use, of the church or church-workers as instruments of law enforcement. That seems a small and reasonable thing to ask, and one that will redound to the benefit, not only of those in need of the cure of souls, but of society in general.

Thank you for the opportunity to present this testimony.

Mr. EDWARDS. Thank you very much, Reverend Kelley, for an excellent statement.

It is a wish of the witnesses to proceed with whom?

Our next witness, Jeri Hamilton.

Ms. HAMILTON. My name is Jerald Hamilton. I am the program assistant in the Department of Law, Justice and Community Relations, Board of Church and Society, the United Methodist Church.

I am here to testify on behalf of the Reverend John P. Adams, director of the department of law, justice, and community relations [reading]:

Honorable Members of the House of Representatives of the Congress of the United States. My name is John P. Adams, I am an ordained minister of the United Methodist Church and a staff member of the Board of Church and Society of that denomination.

I am hastily writing this testimony as I change planes at the Frankfurt Am Main Airport in West Germany. I am accompanying Mr. John Thomas, a Shawnee-Delaware Indian who is returning to Tehran, Iran, after having brought 151 letters from American citizens who are held hostage in the Embassy of the United States in Tehran.

Most of the 151 letters were delivered to family members and friends in 26 States within 9 days. Mr. Thomas and I are taking back to the hostages, with the full sanctioning of the Muslim students holding the embassy, 250 letters and a number of packages, which filled two barracks bags.

I write to you now—though in haste and without important documents and materials in hand—in order to respond to an article in the New York Times, which I read on the flight to Frankfurt—February 1, 1980, page A-1.

The article, the accuracy of which I cannot ascertain from this uncertain vantage point, states in the first paragraph, "The White House is pressing for legislation that would avoid a flat prohibition on the use of journalists, clergymen, or academics as intelligence agents, Senate sources said today."

The article further states that "the Carter administration is proposing that charter legislation for the intelligence community include a declaration that the Central Intelligence Agency would seek to protect 'the integrity of the institutions for which journalists, religious figures and professors work.' The sources did not say how much protection would be accomplished."

May I be so bold as to make a simple evaluation of this proposal. The protection of institutions can be made effectively. That is always easy to accomplish.

The maintenance of integrity is another matter. No professional person whose work involves the keeping of confidence can keep his or her integrity if he or she violates a relationship by divulging information which has been obtained by virtue of a functioning in a professional capacity. This is logically impossible. It is professionally unethical. It is religiously immoral.

The United Methodist Church, through its general conference, said in 1976, "National security must not be extended to justify or keep secret maladministration, or illegal or unconscionable activities directed against persons or groups by their own government or by other governments. We also strongly reject domestic surveillance and intimidation of political opponents by governments in power, and all other misuses of elective or appointive offices."

More recently, the Board of Church and Society specifically spoke to the use of clergy and other religious professionals as informants or as intelligence sources and I quote:

"Other examples of repressive policies and practices were the use of church members, clergy and missionaries for secret intelligence purposes by local police departments, the Federal Bureau of Investigation and the Central Intelligence Agency."

It must be noted that there is a clear dicotomy in the proposal being made regarding the flexibility in the charter legislation. The intelligence community must base its operation on suspicion and an intrusion into citizens affairs.

The religious community, however, is gathered together on the basis of trust—not only trust in God, but trust in one's fellow human beings.

It seeks to express profound love, which includes deep respect for persons and a desire not to violate their personhood.

Some religionists can confuse trust in God with a blind loyalty to the Nation. Our coins say, "In God We Trust," so if a nation trusts God enough to express such on its currency, then, some believe, that that nation deserves the same kind of commitment that one makes to God.

But this distortion of belief, though capable of creating blind patriots, who are ready to desecrate what is holy in order to protect the Nation, does not cause citizens to seek that greater justice in the society and the world which would be reflective of God's will.

The journalists and academics will undoubtedly speak for themselves.

As a clergyman, however, I would want you to know that no violation of an ordination, no exploitation of a pastoral relationship, and no flexible phrasing of any proposed legislation can possibly justify or provide an ethical base for the intrusion of intelligence forces upon the confidences which are shared within the spiritual context. Thank you.

Mr. EDWARDS. Thank you very much.

Our last witness this morning is Rabbi David Saperstein.

Rabbi SAPERSTEIN. Good morning, my name is Rabbi David Saperstein. I am the codirector and counsel of the Religious Action Center of Reform Judaism.

I am testifying this morning for the Central Conference of American Rabbis, representing some 1,200 reform rabbis in the United States and Canada. On their behalf, I wish to thank you for the opportunity to share with you some of our concerns regarding the proposed FBI charter.

I want to add a personal note. Due to recent swirling events, domestically and internationally, we may have caused our country to deviate from our strong belief in civil liberties over the last few years.

This subcommittee, Mr. Chairman, has, through its actions, consistently shown a vision of how important civil liberties are as a bulwark and foundation of our country.

It's an honor to share our concerns with you here this morning.

I am going to skip much of my testimony, which repeats many of the things said by others.

I would like to have the entire testimony, however, included in the written record.

Mr. EDWARDS. Without objection, it will be made a part of the record.

Rabbi SAPERSTEIN. The provisions under question explicitly ask clergy to involve themselves secretly in the affairs of Government and—and this is the key—implicitly permit clergy who obtain information in the course of their religious undertakings to utilize such information in furthering that involvement.

If this provision were implemented, no lay person could be certain that the clergy to whom they revealed confidential information was upholding that confidence. The breach of such confidence and such a trust in a single instance would create doubts in a million minds. Via this provision, the Government invidiously interferes with the trust and confidence which is so vital to free expression of religious identity.

This provision would thereby have a chilling impact on the exercise of the first amendment rights of all Americans.

While members of the clergy are free to act as informants if they wish to do so, they may well be subject to professional restraint but not to legal action. What the CCAR is seeking is a prohibition against Government requests or requirements for clergy to function as informants. There is, within the Jewish tradition, the requirement that in order to save a human life or to prevent treason, a confidence should be broken. But the decision to breach a confidence should flow from the understanding of the religious requirements of a given situation by the individual clergy person.

I should point out that these exceptions to confidentiality are rare. The state should not place itself in the situation of interpreting when such breaches would be justified by the religious tradition of the clergy-person involved.

We wish to create a presumption that clergy will not, and should not, act as informants for the Government and that confidential communications must not be breached by the clergy at the request of the FBI. Such prohibitions would not prohibit the Government from receiving information from clergy where the clergy deemed it appropriate.

It must be understood that the role of the clergy in Judaism is somewhat different than in most Christian denominations. Judaism does not posit a role for clergy between the individual and God. Communication between God and people is direct. Jews do not "confess" to other human beings for the purpose of receiving "absolution."

If this were the end of the analysis, one might argue that a different standard should prevail regarding rabbis than that applying to priests or ministers. Even if this were the case, the Government would be required to evaluate when confidential communication was theologically mandated or merely psychologically prompted. Legislation would then evolve, based on the Government's view of particular religious dogma and practice. Such entanglement could not pass constitutional muster.

More importantly, in practice, the situation for rabbis is little different than for priests or ministers. In 20th century America, both Jews and Christians turn to clergy for guidance, support, and help throughout their lives, young and old, in good times and bad. Our clergy are trained in modern techniques of counseling. They constructively combine such techniques with traditional religious insights and values in order to fulfill their pastoral function.

Thus, in the context of modern Jewish life, lay people turn to rabbis with complete expectation of confidentiality and privacy. The notion of confidentiality is deeply ingrained in Jewish life. The Bible speaks pejoratively of the talebearer. A thousand years ago there was an absolute ban on the violation of the confidentiality of mail, a protection which the United States does not yet provide.

Futhermore, Judaism completely prohibits the use of hearsay evidence. For a clergy to pass on information obtained in confidential communications would be precisely that: hearsay. Even though we are not discussing its use in court here, such use of hearsay violates the spirit of Jewish law.

Personal knowledge of a crime obtained by the clergyperson would not be hearsay and would place an obligation to share with the authorities information about that crime.

Recognizing the importance of confidential communications, the CCAR has repeatedly and unanimously passed resolutions which seek to preserve the total privilege of lay-clergy communications.

Similar considerations and analyses are raised in regard to the use of journalists, lawyers, and doctors as informants. Informant activities of each of these groups must be viewed within the context of our concern for the right to privacy of all Americans.

Unlike Anglo-Saxon law, in which the right to privacy emerged out of traditional property rights, Jewish law regards the right to privacy as an extension of the inherent dignity and individuality of every human being.

It is a right as inalienable as the right of free speech and freedom of religion. The technological capability of producing the world of "1984" will soon be with us. Only our wisdom and our ability to place ethical controls on developing technology will prevent Orwell's vision from becoming the world's destiny.

We must never forget that the fundamental difference between a democracy and a tyranny is that in a dictatorship the workings of the government are closed to the people and the lives of the people are open to the government; in a democracy, the workings of the government are open to the people and the lives of the people are closed to the government.

This aphorism is, of course, subject to the provision that even in a democracy, the government has the right to intrude on the privacy of people where there is sufficient reason to believe that a crime is being committed or activities undertaken which threaten the existence of the system of government itself.

In our legal system, the rights of the individuals are protected by an objective and impartial judiciary. It is the courts which must determine the necessity of such intrusion.

But the provisions of this bill do not adequately meet our concern for the right to privacy. The chilling effect of the section on lay-clergy confidential communication intrudes upon the personal privacy of religious people and the associational privacy of religious groups.

The fact that mail covers, trash covers, physical surveillance, photographic surveillance, pen registers, and electronic location detectors can be implemented without a court order brings closer the specter of "1984."

Subsection 533b(b)(4) permits all of these activities and others by the FBI when investigating the "suitability" of clergy, journalists, lawyers, and doctors as informants.

This would mean that where we expect total confidentiality while getting rid of mailing lists and disposing of personal correspondence in the trash, the FBI without a court order, under the pretense of investigating the suitability of clergy as informants, could simply pick up those records and use them.

Unless you think that this is a far-fetched scenario, according to CBS news, the FBI requested in 1972, as part of its Cointerpro activity, that informants steal the mailing lists of the Religious Action Center which I currently run.

Presumably concerned that the reform Jewish movement was the most outspoken national Jewish organization in expressing our moral opposition to the war in Vietnam, they paid an informer to find out who was involved in our social justice activities.

The memory of that intrusion into the religious activities of the American Jewish community lingers in our memories. We do not wish to see a repeat of such intrusions. Yet when the FBI can use such a broad range of surveillance techniques in checking out the suitability of potential informants, it jeopardizes the privacy of confidential communications and records sent to or kept by their prospective informants. The attendant chilling impact of such activities on the free exercise of numerous first amendment rights is clear and evident.

These activities would be regulated by guidelines from the Attorney General and directives from the Director of the Bureau. The charter provides that these guidelines may remain secret.

When the standards regulating governmental intrusion into the lives of U.S. citizens remain closed to the very citizens it serves, while the lives of the people are open to the Government, there is cause for serious alarm.

Have the lessons from the church committee been relegated now to nothing but an historical footnote?

What this committee will do may well set a precedent for similar legislation to follow. The tragedies in Iran and Afghanistan have led to calls for unbridled power for our intelligence and investigative agencies. If such calls are translated into intrusion into the lives of our citizens, the *raison d'être* for this charter will be destroyed.

H.R. 5030 can be a significant contribution toward enacting consistent and objective standards for regulating governmental investigations. The positive impact of the charter must not be undermined by authorizing activities which conflict with legitimate first amendment rights of our citizens.

We hope that a prohibition against government solicitation of clergy to function as informants will be implemented in this legislation. We ask also that a provision be included which would require that where a member of the clergy feels compelled to be involved in informant activities, the FBI will discourage breaches of legal confidences.

I wish to go on record in support of the recommended provisions suggested by Dean Kelley and William Thompson. I believe such provisions would strengthen the first amendment rights for all Americans, particularly the right to religious liberty.

Thank you.

[The complete statement follows:]

**TESTIMONY OF RABBI DAVID SAPPERSTEIN ON BEHALF OF THE CENTRAL  
CONFERENCE OF AMERICAN RABBIS**

Good morning, my name is Rabbi David Sapperstein. I am the Co-director and counsel of the Religious Action Center of Reform Judaism. I am testifying this morning for the Central Conference of American Rabbis representing some 1200 Reform Rabbis in the United States and Canada. On their behalf I wish to thank you for the opportunity to share with you some of our concerns regarding the proposed FBI Charter.

The particular focus of this testimony on H.R. 5030 is Sec. 533b (b)(3) which relates to the use of clergy and other professions as informants. Our apprehension about this section is based upon two concerns. First, the section raises the threat of violations of the First Amendment provisions providing for separation of Church and State. Second, the section is one of several in the proposed charter which threaten violation of fundamental rights of privacy.

The Justice Department's section-by-section memorandum maintains that this subsection, for the first time in U.S. law, places limitations on the use of clergy and other professionals for informant purposes. In so far as clergy is concerned, the Justice Department's position presumes that use of clergy as paid or unpaid informants by the government has, in the past, been permissible in the absence of a prohibition preventing such use. Our position is contrary. The CCAR maintains that such usage involved violations of the First Amendment and the current attempt to legitimize such usage in the FBI charter violates the First Amendment, runs counter to constructive government policy and undermines that confidentiality between clergy and laity which is so vital to a vibrant and free religious life in the United States.

While the provisions of the charter require that the FBI inform the prospective informant that the FBI is not requesting the person to breach any legal confidence, it does not require that the FBI tell the informant that legal confidence must not be breached. By not discouraging violations of legal confidences, the provision gives implicit approval to such breaches. This is a destructive policy which involves the FBI in the area of religious confidences—an entanglement prohibited by the First Amendment.

In *Everson v. Board of Education* the Supreme Court held that "neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organization or group or vice versa." The provision under question explicitly asks clergy to involve themselves secretly in the affairs of government and—and this is key—implicitly permits clergy who obtain information in the course of their religious undertakings to utilize such information in furthering that involvement. If this provision were implemented no lay person could be certain that the clergy to whom they revealed confidential information was upholding that confidence. One breach of confidence creates doubts in a million minds. Via this provision, the government invidiously interferes with the trust and confidence which is so vital to free expression of religious identity. This provision would thereby have a chilling impact on the exercise of the First Amendment rights of all Americans.

While members of the clergy are free to act as informants if they wish to do so the CCAR is seeking a prohibition against government requests or requirements for clergy to function as informants. There is, within the Jewish tradition, the requirement that in order to save a human life or to prevent treason, a confidence could be broken. But the decision to breach a confidence should flow from the understanding of the religious requirements of a given situation by the individual clergyperson. The state should not place itself in the situation of interpreting when such breaches would be justified by the religious tradition of the clergyperson involved. We wish to create a presumption that clergy will not and should not act as informants for the government and that confidential communications must not be breached by the clergy at the request of the FBI. Such prohibitions would not prohibit the government from receiving information from clergy where the clergy deemed it appropriate.

It must be understood that the role of the clergy in Judaism is somewhat different than in most Christian denominations. Judaism does not posit a role for clergy between the individual and God. Communication between God and people is direct. Jews do not "confess" to other human beings for the purpose of receiving "absolution." Thus, according to the prominent Jewish scholar Rabbi Solomon Freehof, confidential communications between a congregant and a rabbi, unlike those between a layperson and a priest or most ministers, would not be sacramental. If this were the end of the analysis, one might argue that a different standard should prevail regarding rabbis as opposed to priests or ministers. Even if this were the case, however, the government would be required to evaluate when confidential communication was theologically mandated or merely psychologically prompted. Legislation would then evolve based on the government's view of particular religious dogma and practice. Such entanglement could not pass constitutional muster.

More importantly, in practice, the situation for rabbis is little different than for priests or ministers. In Twentieth Century America, both Jews and Christians turn to clergy for guidance support and help throughout their lives, young and old, in good times and bad. Increasingly our clergy are trained in modern techniques of counseling. They constructively combine such techniques with traditional religious insights and values fulfilling their pastoral function. Thus, in the context of modern Jewish life, lay people turn to rabbis with complete expectation of confidentiality and privacy. The notion of confidentiality is deeply ingrained in Jewish life. The Bible speaks prejoratively of the talebearer. A thousand years ago one of the greatest of all medieval rabbis banned the opening of other people's mail. There is a complete ban against hearsay evidence in Jewish courts. Information passed between a lay person and a rabbi would be precisely that hearsay information. Recognizing the importance of confidentiality in the Jewish tradition and in the functioning of the modern Jewish community, the Central Conference of American Rabbis has repeatedly pressed for passage of state legislation throughout the country which would strengthen the privileged status of clergy-lay communications.

Could the section be constitutionally preserved merely by changing Sec. 533b (b)(3)(c) to bar disclosure of legal confidences. In cases involving informant activity other than the divulgence of confidential communication, the danger is that of the "chilling effect." A congregant could not be certain what information was or was not being transmitted. Congregants would not know whether their own clergy were informants or not. Thus, while in theory each American—including clergy—can do what he or she pleases, the existence of such a provision legitimizing and authorizing informant-investigator relations between the F.B.I. and the clergy would have a chilling effect on the religious practices and the associational privacy of Americans.

In Jewish law there is a concept of building a *siyaq*, a fence, around the Torah. This means that certain things which in and of themselves are permissible should be prohibited in order to ensure that more basic values or rules not be violated. Informant-investigator relations between clergy and the F.B.I. should be prohibited precisely because such a prohibition will prevent the direct or indirect entanglement of the government and religion. What Thomas Jefferson termed a "wall of separation between Church and State" separates two realms of authority in American life each of which functions best when the two are distinguished.

Similar considerations and analyses are raised in regards to the use of journalists, lawyers and doctors as informants. Informant activities of each of these groups must be viewed within the context of our concern for the right to privacy of all Americans. Unlike Anglo-Saxon law in which the right to privacy emerged out of traditional property rights, Jewish law regards the right to privacy as an extension of the inherent dignity and individuality of every human being. It is a right as inalienable as the right of free speech and freedom of religion. The technological capability of producing the world of "1984" will soon be with us. Only our wisdom and our ability to place ethical controls on developing technology will prevent Orwell's vision from becoming the world's destiny. We must never forget that the fundamental difference between a democracy and a tyranny is that in a dictatorship, the workings of the government are closed to the people and the lives of the people are open to the government; in a democracy, the workings of the government are open to the people and the lives of the people are closed to the government. This aphorism is, of course, subject to the provision that even in a democracy, the government has the right to intrude on the privacy of people where there is sufficient reason to believe that a crime is being committed or activities undertaken which threaten the existence of the system of government itself. But in our legal system, the rights of the individuals are protected by an objective and impartial judiciary. It is the courts which must determine the necessity of such intrusion.

But the provisions of this bill do not adequately meet our concern for the right to privacy. The chilling effect of the section on lay-clergy confidential communication intrudes upon the personal privacy of religious people and the associational privacy of religious groups. The fact that mail covers, trash covers, physical surveillance, photographic surveillance, pen registers and electronic location detectors can be implemented without a court order brings closer the spectre of "1984." Subsection 533b(b)(4) permits all of these activities and others by the F.B.I. when investigating the "suitability" of clergy, journalists, lawyers and doctors as informants.

According to CBS News, the F.B.I. requested in 1972, as part of its Cointelpro activity, that an informant steal the mailing lists of the Religious Action Center which I run. Presumably concerned that the Reform Jewish movement was the most outspoken national Jewish organization to go on record expressing our moral opposition to the war in Vietnam, they paid this informer to find out who was involved in our social justice activities. The memory of that intrusion into the religious activities of the American Jewish community lingers on our memories. We do not wish to see a repeat of such intrusions. Yet when the F.B.I. can use such a broad range of surveillance techniques in checking out the suitability of potential informants, it jeopardizes the privacy of confidential communications and records sent to or kept by these prospective informants. The attendant chilling impact of such activities on the free exercise of numerous First Amendment rights is clear and evident.

These activities would be regulated by guidelines from the attorney general and directives from the director of the bureau. The charter provides that these guidelines may remain secret. When the standards regulating governmental intrusion into the lives of U.S. citizens remain closed to the 10 citizens while the lives of the people are open to the government, there is cause for serious alarm. Have the lessons from the Church Committee been relegated now to nothing but an historical footnote?

What this committee will do may well set a precedent for similar legislation to follow. The tragedies in Iran and Afghanistan have led to calls for unbridled power for our intelligence and investigative agencies. If such calls are translated into unregulated power for government agencies to intrude into the lives of our citizens, the *raison d'être* for this charter will be destroyed.

H.R. 5030 can be a significant contribution towards enacting consistent and objective standards for regulating governmental investigations. The positive impact of the Charter must not be undermined by authorizing activities which conflict with legitimate First Amendment rights of our citizens. We hope that a

prohibition against government solicitation of clergy to function as informants will be implemented in this legislation. We ask also that a provision be included which would require that where a member of the clergy feels compelled to be involved in informant activities the F.B.I. will discourage breaches of legal confidences.

Mr. EDWARDS. Thank you very much. The gentleman from Ohio, Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman. The gentleman from Massachusetts got here before I did, and perhaps we ought to go in the order of arrival. But I will leave it up to him.

Mr. DRINAN. I will yield happily to you.

Mr. SEIBERLING. Thank you. This has been a most helpful and impressive testimony. Let me just say preliminarily that I was impressed by the comment that perhaps Members of Congress would be even more sensitized to the possibility for abuse of power inherent in the intelligence-gathering agencies today than they might have been a week ago.

It is clear that the intelligence agencies are suffering from some kind of a sickness that we thought perhaps was only something connected with the Nixon years and the abuses of Watergate.

I wonder if we do not have here a rogue elephant which, unless it is brought under proper restraint, is going to destroy our structure of civil liberty and turn this country into a police state. All men are sinners. All are weak. And the Bible says that none are perfect, not one.

And when we give the power to an intelligence-gathering agency to exploit whatever may be the weakness of a particular individual, and they have the means of finding that out, and to create a crime, and then find how to implicate that individual and seduce him into committing that crime, we are at the beginning of the end of civil liberty. If that power is unchecked, any person in this country, be he politician or citizen, can be destroyed.

I think that this hearing is most timely. And your testimony is most timely. As someone who was brought up and baptized a Presbyterian, I was particularly impressed with your statement on behalf of the Presbyterian Church, Mr. Thompson. But all the statements were most impressive.

I certainly agree with you that it is time we put some restraints on the FBI in its charter from doing the things that it has done wrongly in the last decade, and I think the very draft that the administration has submitted us as a charter is an evidence of the sickness that we are compelled to deal with.

I personally intend to be as outspoken and as rigid and as harsh as I can, because I think the time has come not to give a freer rein to the intelligence-gathering agencies, but to rein them in. And that is not to say that we do not have to have viable intelligence agencies. Certainly we have to figure out ways of minimizing the possibility of intelligence leaks, particularly leaks coming from too many oversight committees.

Nevertheless, there has to be some line drawn. And certainly the use of clergy as agents, either by the CIA or the FBI, is something that is reprehensible and is incompatible with the separation between church and state.

There is only one area where I think I have some question, and I would like to get your advice. We have had some evidence in recent years of religious organizations involved in the commission of crimes.

We had one order of priests who were involved in some kind of a fraud scheme in the last few years. We had the so-called Church of Scientology, some members of which were engaged apparently in various criminal activities. I am sure that, people being human, even church officials have strayed at times.

Would you make an exception, any of you, for the use of an informant who would be a clergyman, in a case where the organization itself was suspected, or members in the organization that were suspected of criminal conduct, and the only way the law enforcement agencies could find out would be to try to get some members of the organization to act as informants? What would be your thought on that particular type of situation?

Mr. THOMPSON. Perhaps I might respond initially. In my judgment, the situation you describe fits perfectly that in which a clergyman has personal knowledge of the commission of a crime.

In such a case, the clergyman has the same obligation come forward or to testify that any other citizen has. As Rabbi Saperstein has indicated, the particular abuse to which we are objecting is the revelation of confidential communications, not personal knowledge of the commission of a crime.

Reverend KELLEY. Mr. Seiberling, I would like to suggest an additional consideration. I think you have put your finger on a very difficult problem which arises when a law enforcement agency would attempt to gain evidence by obtaining information from a member or professional person in a church suspected of being the site of criminal activity.

I would suggest that, even there, the same prohibition should apply. That the law enforcement agency, in this case the FBI, should be prohibited from seeking to obtain services of an informant of a clergy-person or full-time churchworker for the reason of protecting the relationship of confidence and trust.

On the other hand, there is no reason that clergyperson could not or should not volunteer information about a crime that he or she becomes aware of occurring within the church, or the FBI could seek to obtain the services as an informant of church members who are not in a position of clergy or full-time churchworkers. That would, I think, do less to impair the essential relationship of confidence and trust, though even there, it would be deplorable, I think, that it had to occur; but crimes do happen, even in churches.

What I would want to protect, though, is the role of the professional clergy, the recipient of confidences and confessions, from being sought as an informer by the FBI.

Mr. SEIBERLING. Clearly that is beyond the pale, it seems to me, where you are using clergy to get information on people outside the church or religious order.

While I suppose there might be some commonsense ground here that the FBI could go to a minister, priest, or rabbi and say we have reason to believe that so and so in your organization is engaged in criminal activities and describe the general character of them, and say if you happen to observe any of the following, we would appreciate it if you would advise us.

That doesn't put him under any particular status as an observer, but merely telling him there might be crimes. That if he observes them or evidence of them that they would appreciate knowing about them. Would that be within the proper bounds, in your views?

Reverend KELLEY. If I were the clergyperson in that situation, the important thing to me would be whether the information I happened to have that might suggest the existence of crime was obtained in the course of a relationship of religious ministrations.

If it was, it is comparable to the seal of the confessional, which is that even if I knew a person were a criminal or had committed a criminal act, but I knew that because of a privileged relationship, I would not be in a position to volunteer that information.

That leaves free, however, a range of observations. I have known situations where clergy were as anxious to get to the root of something that appeared to be fishy in the church as any law enforcement agency would be. And there might be ways to do that that would not violate the relationship of confidence and trust.

Mr. EDWARDS. The time of the gentleman has expired.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I listened, as always, with great interest to what my friend from Ohio had to say. He used the term "rogue elephant," which I believe was coined by the distinguished Senator from Idaho regarding the CIA.

I would suggest in this context we change the term to a foamy-mouth, mad donkey, because that's what we are dealing with today. Henry Stimson said, I believe, gentlemen don't read other people's mail, which has a ringing sound down the corridor through the years.

I would assume, Rabbi, you agree with that and would reinforce it today that we should never have mail covers on anybody. Even should your child be kidnaped, right? Let's not read anybody's mail.

Rabbi SAPERSTEIN. Where an impartial court believes a crime is being committed and the impartial court evaluates that intrusions of privacy can constitutionally be undertaken, I believe that is proper.

What I disagree with is the unilateral and unregulated authority of the FBI without going to an objective impartial court to make that decision for themselves.

Mr. HYDE. That has a ring of commonsense to it, I will agree. But there are judges, and there are judges. I dare say that would be more facade than reality, although maybe well worth doing anyway. At least of someone who is outside the agency. But there is forum shopping, and they have their favorite judge.

In any event, I might point out this strong separation-of-church-and-state theme that threads its way through all of the testimony, I hope won't be taken too literally, because the recent news accounts indicate the lessons of Watergate have not permeated Congress as yet, and we do need your counsel and we need some involvement with the clergy, it seems these days.

Would you have the FBI have informants in the Reverend James Jones movement, Rabbi?

Rabbi SAPERSTEIN. Again, in cases where a religious organization engages in fraud, where a religious organization steals mail, where a religious organization kidnaps, as James Jones—

Mr. HYDE. Is suspected of, which is all it was before Congressman Ryan went down there.

Rabbi SAPERSTEIN. There is a standard of proof that I believe needs to be employed by the Government. Now the question is whether or not the FBI should have or could have used informants to investi-

gate criminal activity suspected to be taking place in Jonestown or here in the United States in the sect. We are not speaking about that today.

What we are speaking about is whether or not the FBI could have gone to ordained clergymen or other church employees employed in a position of receiving confidential trusting communications akin to the confessional in Christianity, and have sought those people to act as informants.

Considering that in Jonestown there was a very small group of clergy to my knowledge only one or only a few ordained ministers involved, it seems to me that for the FBI to have sought out the ministers and involved them as informants really would have been counterproductive. The costs would have far outweighed the benefits. The other 900 people could have served as informants if there was reasonable suspicion of criminal activity and, I believe, in that case there would have been sufficient suspicion.

Mr. HYDE. Do you realize there are clergy who are deeply immersed in politics. Archbishop Markarios of Blessed Memory? There is a bishop now being accused of being a Nazi war criminal, an orthodox bishop involved. Sometimes it is difficult to separate the clerical clergyperson activities from the political.

Rabbi SAPERSTEIN. I believe Cyprus, Germany, or Rumania in the cases to which you referred would have been far more healthy and in better shape had there been the kind of separation of church and state that we have in the United States today.

Mr. HYDE. You mean these men had not been involved in politics?

Rabbi SAPERSTEIN. That's right.

Mr. HYDE. Surely you wouldn't bar clergy from being involved in politics over here? Even I [laughter] even I, while secretly assenting to what you are saying, would publicly repudiate that.

Rabbi SAPERSTEIN. That clearly isn't the issue about which we are talking. As individuals, clergy can be voluntarily involved in politics and criminal justice. This at least in the Jewish religion, when certain confidences can be breached. But it must be a voluntary act.

Mr. HYDE. Why can't the FBI ask a question of somebody and they are voluntarily free to give it or not give it. Why would you bar them from talking—

Rabbi SAPERSTEIN. If the FBI asks a minister, rabbi, or priest if they have personal knowledge of a crime, I believe that that question is proper and should be answered.

If they ask that same clergyperson to share not personal knowledge but hearsay knowledge given to them in a confessional type of setting involving trust and confidence, I believe that it is a violation of religious practices.

Mr. HYDE. We are getting somewhere. So you would not bar, let's say the Puerto Rican national liberation FLAN which has claimed a lot of bombings around this country—let's say there is a clergyman who regularly attends their meeting. You wouldn't bar the FBI from talking to that clergyman and asking him if he would mind letting them know if they are planning on bombing city hall tomorrow?

Rabbi SAPERSTEIN. If that person came as a member of a group on an equal par with all the other members, clergy and nonclergy alike, then I think those questions would be proper. The clergyman may

refuse to answer and engage in civil disobedience by doing that. That would be the right of any person to do; but that does not involve information shared in the confessional kind of setting.

The real difficulty, Mr. Hyde, arises when the FBI seeks to use that person as an informant, because then no one who speaks to that clergyman would then know whether information in a confessional setting is being passed on. That would really have a chilling impact on the exercise of first amendment rights.

Mr. HYDE. I couldn't agree with you more; but my point is, and I think I understand you, that you don't immediately disqualify some clergyman from providing information so long as it hasn't been received in the confidence of the confessional or consultation.

Rabbi SAPERSTEIN. I'm glad we are on the same wavelength. You agree they shouldn't be used as informants and violate the confessional, but where it's personal knowledge, questions would be appropriate. That is what I heard all the clergymen represented here today saying they espouse.

Mr. HYDE. I agree.

Mr. SEIBERLING. Would the gentleman yield? I don't know whether it's proper to characterize the problem as one of an elephant or donkey, but I suspect will find there were some jackasses involved.

Mr. HYDE. Then you agree with the donkey relation?

Mr. EDWARDS. The gentleman from Massachusetts?

Mr. DRINAN. Thank you, Mr. Chairman. As everybody knows, this bill is an attempt to identify the informant and somehow to know where the information comes from. That is the whole thrust of the bill.

Furthermore, in this particular category where people have confidential information, the bill, as proposed by the FBI, specifically precludes any revelation of confidential information. It's understood that the enlisting as an informant of anybody in this category is unusual. It must be expressly authorized in writing by the director of the FBI. The Attorney General must be informed in writing immediately, and third, listen to this, the person is advised, the clergyman is advised that in seeking information from him, the FBI is not requesting the person to breach any legal obligation of confidentiality which such person may be under.

Consequently, if we accept the proposition advanced here, we say the clergy cannot be certified as informants, yet obviously, as everyone admits, the clergy can go forward to the FBI and say, I know where drug peddlers are or I know about some subversives or people with heroin.

So you're keeping a whole class of people outside of the group of certified informants. Informants are going to be used, the FBI insists. We want to catalog them. We want to somehow know where this information is coming from.

You people are saying that despite the restrictions here, despite the clear protection of confidentiality, you want the clergy not in this group at all. I can see situations where the clergy can do a very good function under the situation here without any compromise to their principles.

It seems to me you haven't read the act, you don't understand what the FBI is driving at. I wonder if Dean Kelley would react to that.

Reverend KELLEY. Sure. I think you have pointed out where the charter is designed to improve the present situation by at least gaining

some overt recognition and authorization from higher up in the Justice Department. That might suffice if it were not that the intentional use of clergy as informants taints not the individual used alone, but the whole profession. They then can be seen as potentially fronts for the FBI.

Mr. DRINAN. Indeed, Dr. Kelley, they are going to be rare. We know who they are. At least this committee can find out in its oversight function of the FBI. We will know, and that these individuals violate their own personal standards and they violate the law if, in fact, they give anything that is received in a confidential capacity.

Reverend KELLEY. Mr. Thompson raised another question which is placing the burden of making that distinction upon the clergyperson, which is a professional burden they would need to undertake in any event that the question was raised, of what is privileged information. But I also added that the legal recognition of the priest-penitent privilege is the core rather than the circumference of what we view as privileged relationships, and that the boundary is unclear.

We would prefer that the FBI be kept away from it entirely so that the initiative would not come from them to seek to employ a clergyperson as an ongoing informant. They could inquire of the clergymen.

Mr. DRINAN. Dr. Kelley, you have misconceived the purpose of the law. The law would say that if somebody comes forward and volunteers information, we want to know who this person is. The FBI should not be allowed to accept information until an FBI official makes a written finding that the informant appears suitable.

You're saying that all those radical right-wing evangelical clergymen who think there are Communists and subversives everywhere can go and talk to the FBI, but the FBI can't certify them. So you're causing the clergy to be a group apart. We don't know who they are, but they will be talking to the FBI and giving information, the accuracy of which we can't check.

Reverend KELLEY. I think I have said as much as I have to say on that.

Rabbi SAPERSTEIN. We read the bill very differently in terms of the protections it provides. I see that the bill does permit them to seek out clergymen to be informants. The fact you say it is rare is something that may be known to you, but I believe would not be known to the millions of Americans whose religious practice revolves around their having trust in the clergy.

You say that this bill prohibits the violation of the confidence. I read it very differently. At best, the bill required the FBI to say to the people. "We are not 'requesting' that you violate the confidence." Implicitly that says if you do violate it to give us valuable information, that will be helpful. If there is going to be a bar and a prohibition, the bill should say that.

Whether a clergyman who is requested to inform does so may be known to the committee in its oversight capacity, but it would not be known to all the people out there in the country because these activities of the Government is closed to them. Such a pattern would create the chilling impact that I pointed out before.

One violation, one breach of confidence instills doubts in millions of minds because no one knows, is this case the rare exception? The person to whom I'm talking, is this the clergy person who is violating confidences? Maybe I shouldn't say anything confidential?

Mr. DRINAN. How are you going to answer my difficulty that the moment you say all of the clergy of the country are a group apart, we won't certify them. They are going to go to the FBI. In fact, the FBI will go to them; if this is deleted, the FBI will go to them on a regular basis and these people will not have any names in the FBI file.

Yet they will be getting information and we can't check the accuracy of the information. You're saying that, keep the clergy out. Don't have the clergy requested. But the clergy will, in fact, go. I know a lot, to repeat, of some right-wing people who will be giving unverified information to the FBI.

Rabbi SAPERSTEIN. There is nothing that prohibits any records which would be kept otherwise be kept.

Mr. DRINAN. You're putting a big loophole in the system we are trying to devise. We want to know where the information comes from, who are the informants, why were they certified, what did they say, and what did the FBI do to check it.

You're saying the clergy can go and inform the people unlike all other Americans.

Rabbi SAPERSTEIN. No one is saying the records would not or should not be kept. What we are saying is that the FBI should not seek clergy informants, over and above those clergy who come forward voluntarily. The records that would be kept for voluntary informants would of course be proper. There should be a ban against the FBI seeking clergy to be informants and a ban against the divulgence of confidential confessional—

Mr. DRINAN. You're in effect saying the clergy are disqualified by American law from doing what other Americans do. We are not going to have people voluntarily coming forward and having the information accepted by the FBI.

The whole theory is we want to know who these nameless faces are. I thank you very much and yield the balance of my time. I'm sorry.

Mr. THOMPSON. May I respond, Mr. Chairman?

It seems to me that Father Drinan's question assumes something that the statute itself does not provide. The section we are discussing has the operative verb "request." It says the FBI may request clergy to become informants. That does not in any way prohibit a person coming forward voluntarily.

Now the thing we find objectionable is for the FBI as an investigatory agency being able to approach a clergyman and ask that individual to become an informant. That is the thing we find objectionable.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer?

Mr. VOLKMER. Thank you, Mr. Chairman. Now, as I read the testimony of Mr. Thompson—I am sorry I wasn't here when you gave it—the very last paragraph on page 6 says, "You are urged to delete from this legislation all provisions for use of clergy," and forget the rest of it; now, you really didn't mean that, did you?

Mr. THOMPSON. Yes, I did.

Mr. VOLKMER. If we delete it all, we are right back where Father Drinan is, is where we are.

Mr. THOMPSON. I do mean delete it. I mean the FBI should not be authorized to request clergymen to become informants.

Mr. VOLKMER. You are a lawyer, Mr. Thompson?

Mr. THOMPSON. I am. I added extemporaneously something that you did not hear.

Mr. VOLKMER. What?

Mr. THOMPSON. I said, "Perhaps [you,] in your consideration of the statute, will consider it necessary to enact a prohibition of such utilization of the clergy altogether."

I have no action of the general assembly of my church that says that. My church has never even considered this possibility. They have made general observations which relate to this entire issue, but they have not considered the possibility that the Congress would be considering a statute which would permit the FBI to approach clergy persons and request them to become informants.

Mr. VOLKMER. Is it your fear that the clergymen are so weak that they would fail in their duties, and we have to protect those clergymen, the weak ones, by law, by saying that you can't even be approached by the FBI because you may violate a principle of your religious belief to God?

That is what you are telling me? You don't have faith in your people?

Mr. THOMPSON. I am certainly not saying that.

Mr. VOLKMER. Why? You are.

Mr. THOMPSON. There are certainly weak clergypersons, as there are weak members of Congress.

Mr. VOLKMER. Yes. I won't deny that.

Mr. THOMPSON. The fact remains that I am concerned not about those weak ones; I am concerned about the fact that the FBI can approach any clergy person and request that that person become an informant.

Mr. VOLKMER. It's an asking. It's not an order. It's not a compulsion. It's an asking. All he has to do is say "No. I don't even want to talk about it," is all he has to say.

"Would you please leave my office? Would you please leave my home? No, I am not going to talk to you on the telephone. I want nothing to do with you."

Just like I can do that, any other member of society can do that. That is all that this law, present law, that is where Mr. Saperstein and I, you and I disagree, too.

You say the first amendment prohibits this whole thing, church and state. I disagree, and I think the gentleman from Massachusetts disagrees with you, too.

I think unless we write something in here, there is no prohibition whatsoever, there is no restriction whatsoever. If we take this language all the way out, that the FBI can go willy-nilly and approach anybody without any question of confidentiality, without even knowing who they are contacting or anything else.

In my opinion—and then turn right around, if it is a violation of the first amendment, Mr. Saperstein, if it is, it doesn't make any difference what we write. It's unconstitutional, and we can't change the Constitution by law.

So I want to get right back to one other question. Excuse me.

Mr. THOMPSON. One part of this question was addressed to me before the part that you turned to Mr. Saperstein.

The difficulty that I see with this legislation, which perhaps has not been conveyed sufficiently, is the fact that the area of confidential communications which are protected by the statutes regarding privilege is not precisely defined and it imposes on the clergy person himself a decision as to which communications he is at liberty to divulge and which he is not.

I think that is an unfortunate——

Mr. VOLKMER. Right. This I will say is a concern of mine. To make sure that that confidentiality is honored, all right, but other than that, I really do not see anything wrong personally with the FBI contacting any member of any church and asking them if they know anything about a drug pushing that has been going on down the neighborhood.

Now if you think that that is wrong, and that he shouldn't even be contacted, I see where you are telling me that those people shouldn't participate in the full governmental function of this country.

Rabbi SAPERSTEIN. Existing law even as interpreted by the Supreme Court is not always totally coextensive with what we believe the first amendment should do. Many of us take a position that the first amendment if it had been interpreted as we feel would be proper, would prohibit such activities.

I was saying I believe it should have been.

Mr. VOLKMER. I believe in your statement, you say it is.

Rabbi SAPERSTEIN. No, I say it should have been. In other words, I say it is, by the first amendment, prohibited; but not that, as interpreted by the Supreme Court, existing laws come out that way. There are many cases where those of us who are absolutists on the first amendment hold a position that the first amendment goes beyond what the Supreme Court has interpreted it to hold. I hope the Court will continue to move in our direction.

Mr. Volkmer, I want to clarify exactly what it is we are saying. We are saying that where information is brought to personal knowledge, the FBI can approach them. So it doesn't prohibit the FBI from approaching them for information about things that have come through to their personal knowledge.

We believe that there should not be in this something that legitimizes the informant, the ongoing. Maybe we hear that technical word differently, but when we hear informant, we all have an image of an ongoing relationship where constant information will be sent to the FBI.

We believe it's proper for the FBI to ask people to respond from personal knowledge, not hearsay knowledge, not information which came from the confessional. That ought to be banned.

Mr. VOLKMER. I agree.

Rabbi SAPERSTEIN. Then we are not so far apart as your initial comments made me think. We wouldn't want to see a legitimization of the informant relationship. As far as who the people are and records kept about them, once someone volunteers, they expect that the FBI will do a check on them on who these people are. They know that confidences will not be breached without their knowledge.

They can expect that the investigative material will turn up information that otherwise they would assume to be confidential, because they have initiated that; such a relation with the FBI thus in response to an FBI question about personal knowledge they have, information that has come to them not in the role of clergy, but has come to them

as it does to any other person, they may say "Yes, I know something, I am willing to work with you." Or they may say, "No, I can't say that because of my clerical responsibilities."

What I am concerned about is that right now, this bill authorizes the FBI to do mail covers and trash covers and all kinds of security checks. Personal surveillance can be done about me when I have not been asked about anything by the FBI, when I have not voluntarily responded to the FBI about information I received as an individual rather than as a clergyman. When I don't even know you are investigating me, I assume it is safe to throw out in my trash can copies of confidential communications.

I wish I could afford a shredder. Most of us have very lifted budgets. I would rather have another staff person. When I have not entered voluntarily into an informant relation with the FBI, I don't expect the FBI is going to be doing such investigations. That is what I am concerned about.

When a voluntary relationship has been set up, we don't have a problem like that. When the information we are talking about comes to us as individuals, but not in our role as clergymen we can share it. That really is our fundamental distinction from the point you are making.

Mr. VOLKMER. My time is up. Thank you.

Mr. EDWARDS. Well, the problem of informants is difficult anyway. It's difficult from a constitutional right point of view. In a perfect society, you couldn't have an informant system without a warrant. If even then, and without probable cause of a crime being committed.

It's like breaking into your home, having an informant sitting in the room listening to the family conversations. There is no two ways about it. It's like tapping your telephone. In some way, it's probably worse than tapping your telephone, so there is a real problem.

However, the police organizations are doing the things that you itemize in your testimony, Rabbi. The FBI and police organizations engage in mail covers, trash covers, physical surveillance, traffic surveillance, camera registers, and electronic surveillance without warrant.

They do that, but now the FBI asks us to legitimize that by saying that in Federal law, "Yes, we are going to do these things, and the laws says we can."

Some courts say they can't do some of these things. It's muddled, and there are real constitutional problems. So it seems to me that from this testimony, the opinion of all the witnesses is that probably they are going to continue to use, here and there, clergymen, clergywomen, and media people as informants, but that we haven't any business saying in Federal law that it can't be done. Is that correct? Is that what the charter says, that the charter legitimizes it by making it a part of Federal law?

It says, "Yes, you can use clergy people as informers. But we have certain regulations that go along with it."

Rabbi?

Rabbi SAPERSTEIN. Yes, I think insofar as setting up an ongoing informant investigative relation, and so far as breaching confidences, we believe that should be banned. It doesn't stop, on an individual basis, clergy from coming to the FBI as individuals. That will be done.

If these people happen to be clergy persons they will be in an informant position, but we don't want to legitimize it. We specifically

don't want to legitimize these kinds of background searches on suitability that can turn up all kinds of confidential information.

That, to me, is really one of the most aggrievous omissions and difficulties of this legislation, so I think your description was quite accurate, Mr. Edwards.

Mr. EDWARDS. Do any of the witnesses think that there should be specific prohibition in Federal law against a Government agent taking the identity of a clergyman or women of the clergy and walking around and getting information?

Reverend KELLEY. Precisely. That is what I proposed on page 10. That the FBI may not assign or require its employees to misrepresent themselves as members of the clergy or churchworkers, nor may it establish, undertake or operate a proprietary purporting to be a church or church agency. Definitely.

Mr. EDWARDS. Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman. I think this has been a very fascinating discussion. I don't really see any basic conflict between Father Drinan's concern about having a regularized systematic procedure within the intelligence agencies for recording informants and having some standards governing the use of their information and the position that all of you have taken.

It seems to me that, and I would be interested to hear it as well as your comments on it, it seems to me that if in fact a member of the clergy or official religious person comes to the FBI and gives information, that that ought to be subject to a regularized reporting procedure the same as any other information. Whether it comes from someone who is officially an informant or not.

It seems to me also from your testimony that you do not object to the FBI going to a clergyman and saying they have evidence of certain criminal activity going on, whether it's in the neighborhood or in the church or synagogue or whatnot. And that it's of a certain character, and if the clergyman witnesses it, or has any evidence on it, they would like him to let them know.

If in fact the clergyman does do that, I suppose that it could be regularized in the form of reporting. And the real question that almost becomes a semantic one, does that mere request for someone to keep his eyes open make him an informant? As it's defined in this bill, it would, as I read it.

But it might be possible to make a distinction between someone who is simply asked to act as an informant on a regularized basis, and one who is asked, simply told there is evidence of certain crimes going on, and if you know of any such thing we would like to know it.

There is even another inbetween situation, it seems to me, where the person is not an informant, but periodically the FBI go around and say to various clergy, "We're concerned about certain things, have you seen any kind of this activity going on?" And the minister can answer or decline to answer, as he sees fit.

We're drawing some very fine lines here. Maybe they can't be drawn completely in a statute. But I think I share your feeling that if we regularize by statute the idea that news media or ministers can be used as regular informants, we have destroyed to some extent the faith of the people in the media and in the clergy.

I think I would have to come down on the side of erring in the direction of exempting them rather than in regularizing this as a practice. I would be willing to yield to my colleague.

Mr. DRINAN. Thank you for yielding. Let me pick up on that. In effect, the bill would be saying, as the witness would want it, the bill would be saying that the FBI really shouldn't talk to the clergy. That is the way it would be construed. Because there would be no way of talking on a regular basis to these clergy because they couldn't be certified informants.

The thrust of the bill would say we don't want you talking to those practicing clergymen because we don't know the accuracy of the information, no one has certified that they shall be an informant.

I guess the question is, do we want to lock out these people. I'm wondering what ACLU would say. Article 6 says no one shall be denied any public office because of his religious beliefs.

Mr. SEIBERLING. What is this certified informant? How does that differ from someone who just comes in and gives evidence to the FBI?

Mr. DRINAN. They can put down that evidence but there is no way to check up on that. They may use that evidence and we want to know where they're getting this evidence and is it accurate. We want to have some idea of who the informant is.

Mr. SEIBERLING. Can we require the same reporting of information, if it's a volunteering of information, if it's some sort of an informant who has been picked after going through a certain procedure?

Mr. DRINAN. According to the testimony of the witness, they don't want clergymen to be in that category at all. They're denying them this semipublic official place.

Mr. SEIBERLING. That is the position as I read it. They're denying them a semiofficial position but not saying there is anything wrong with clergymen giving information. I gather they're also saying they don't object to having the particular informer checked out in the same way as an official.

Mr. DRINAN. I'm asking my friend Dean Kelley how he justifies this with article 6 that says no one shall be denied public office because of religious belief.

Reverend KELLEY. I don't have the advantage of being a lawyer, Father Drinan, and therefore can only read what the words say in the proposed legislation, which is that the FBI may request a clergyman, in this case, to collect information as an informant. And the opposite version which I propose was that the FBI may not request any person under privilege of confidentiality such as a clergyman, to collect information as an informant. In my view that does not go to the civil capacity of a clergyperson as safeguarded by article 6, which has never been construed by the Supreme Court, unfortunately. But we entered a friend-of-the-court brief in McDaniel upholding the right—

Mr. DRINAN. We're very grateful for that.

Reverend KELLEY [continuing]. To run for public office. The clergyman is not running for public office in this clause. In fact, my recommendation in the testimony is that they be excluded as a profession from being sought affirmatively by the FBI to operate actively as an informant.

Mr. DRINAN. Dean Kelley, suppose your version of this law went through and a clergyman came forward and said I want to be an informant. Maybe I need the money. It's a job. Maybe I want to tell them all about the heroin in Spanish Harlem and it's my obligation, and that I can tell the FBI but they are not going to listen to

me. I have to get a position as a certified informant in order to carry out my religious duties as I see it. Under the free exercise of religion he says you can't lock me out and deny me this position just because I'm an ordained clergy.

Reverend KELLEY. May not "request". The FBI is not requesting.

Mr. DRINAN. But you're saying that is such a case the FBI may hire this guy, if he volunteered, and they may put him on the payroll as an informant. Is that your position?

Reverend KELLEY. That is the present bill, isn't it? The present proposal would allow that?

Mr. DRINAN. No. If you excise the clergy here they would be in limbo. That if this went through, a licensed physician could become a certified informant, an attorney, a journalist, but not the clergy.

Reverend KELLEY. I don't think any of them should, but I'm not in a position to speak to that.

Mr. DRINAN. That is another question. If you omit them, that would mean that there is no certification and that they are precluded.

Reverend KELLEY. Yes.

Mr. DRINAN. In all cases, even if they come forward——

Mr. VOLKMER. No. They want to bar the request.

Mr. DRINAN. Why don't you put it this way.

Rabbi SAPERSTEIN. That is what we've been proposing.

Reverend KELLEY. The FBI may not request a person to collect information as an informant. If he comes forward——

Mr. SEIBERLING. The key word in this bill as I read it in this section are request and collect. As I read your position there is nothing wrong with the FBI going to a clergyman and asking him if he knows about certain things going on. Isn't that your position?

Mr. THOMPSON. That's right.

Mr. VOLKMER. No.

Mr. SEIBERLING. They just said it is and have repeatedly said it is.

Mr. VOLKMER. Will the gentleman yield?

Mr. SEIBERLING. I will in a minute.

Mr. VOLKMER. When you finish I'm going to show you where they didn't say that.

Mr. SEIBERLING. They have repeated they said it.

Mr. VOLKMER. If they said it, they didn't say it before.

Mr. SEIBERLING. We will let them speak for themselves.

Mr. VOLKMER. All right, I will.

Mr. SEIBERLING. As I understand their position, there is nothing wrong with the FBI going to a clergyman and asking him if he knows of certain facts, and there is nothing wrong with the clergyman volunteering and saying I would like to provide information to the FBI. What they're saying is that the FBI can't go and request that person to become a systematic collector of information. Is that your position?

Reverend KELLEY. You have stated my position.

Rabbi SAPERSTEIN. I believe that is the position we have been trying to voice consistently today.

Mr. SEIBERLING. OK, that answers my question. I yield to whoever has——

Rabbi SAPERSTEIN. We would want to see the ban on, a prohibition also of requesting information that came out of confessional kinds of confidential communication. You think it's there. We don't. We would

want to see that one aspect of information, we would want to see a prohibition on, confessionally. That they would be banned from requesting any kind of information that came out of the confessional kind of setting.

Otherwise one goes voluntarily and says I want to be an informant, that person is hired and you have really enlightened my understanding of article 6. I never thought of a paid informant as a public office before and it's an interesting, on-the-borderline situation.

Mr. DRINAN. Rabbi, we are trying to legitimize it and trying to get a hold on it. Right now we have no idea of who these informants are and it's a disastrous system. I would agree with the ACLU that every informant should require a judicial order. We should get a warrant.

As the chairman said, this is an intrusion into privacy. I'm not certain that is attainable because the law enforcement people say that would be impossible. I hope we're moving toward that.

So it is a quasi-public official. What you people are saying is that only volunteers can talk to the FBI. And that if somebody walks up and says I want to do this, OK, they can certify him and put him on the payroll. I don't like this because the volunteers can be the worst possible types.

If some good person in the FBI says listen, we have a whole bunch of radical right wing here giving false information but they've been certified, we should have the opportunity of going and getting some solid information.

Rabbi SAPERSTEIN. Because of these difficulties, might it be possible to seek a provision wherein these categories which raise serious first amendment problems, the categories of journalists, doctors, et cetera, that in that kind of category alone there be a different standard—

Mr. DRINAN. That is precisely the thrust of the bill.

Rabbi SAPERSTEIN. Requiring judicial review in that kind of situation?

Mr. DRINAN. That is a good suggestion, that at least in this instance they should get a warrant.

Rabbi SAPERSTEIN. I think that would also be a further protection. I think that would be most helpful.

Mr. DRINAN. That is a very helpful suggestion. I thank you and yield the balance of my time.

Mr. EDWARDS. Mr. Volkmer?

Mr. VOLKMER. So we do have an understanding of what we are saying—as I understand it, you're now saying, maybe you said it before and I didn't understand it that way, that your prohibition should be that the clergy should not be requested to participate as a full-time informant, or an informer that does it on a regular basis?

Rabbi SAPERSTEIN. Yes.

Mr. THOMPSON. Regular basis?

Mr. VOLKMER. Rather than being contacted once a month. Interesting. Like I said, what did you say? What about that?

Rabbi SAPERSTEIN. Those are very difficult distinctions.

Mr. VOLKMER. You can write it into law and say you can only contact this clergyman once a week, once a month, once a year.

Rabbi SAPERSTEIN. I see a clear difference between the FBI coming to someone and asking for knowledge of past events and the FBI saying, "You will now have a relationship with us where you will report to us on an ongoing basis about future events."

So I would think there is a legitimate distinction between coming once a month, once a week, whatever it might be, to say, "Has attention come to you in your capacity as a citizen of the country that you can share with us about information about criminal activity?" I do see a distinction between that situation to the FBI requesting that we set up an ongoing informant investigative relationship. I do see that distinction. I want to ban the second. I do not think, legally, we can ban the first.

Mr. SEIBERLING. Would the gentleman yield?

Mr. VOLKMER. Not yet. I'm not finished. And to use the word the gentleman from Ohio used, know, k-n-o-w. That is a keyword. He said the FBI wouldn't be, under your provision, what you want, asking someone if you know of a certain activity, or certain crime being committed. Then it gets down to subjective, what is the word "know"? Is that correct? That is what I meant when I said to the gentleman from Ohio that I didn't quite understand what he understood what you said.

Because if you say it's alright for him to say to that man in a request, "Do you know of a certain activity or certain crime," knowledge can come more than one way. It can be firsthand. So if I understand what you are saying, you want us to write in here that they can only ask if it came of firsthand knowledge.

Rabbi SAPERSTEIN. No, sir.

Mr. VOLKMER. You don't want any hearsay. You don't want to ask him if he may have hearsay; is that right?

Rabbi SAPERSTEIN. That's not accurate. Information given in a confessional is always hearsay.

Mr. VOLKMER. I agree with that.

Rabbi SAPERSTEIN. Under Mr. Seiberling's scenario, people can volunteer to be ongoing informants and the FBI can request information about existing situations, information firsthand or secondhand, about existing situations. But the FBI cannot request that they, in the future, continue to set up an ongoing relationship.

Mr. VOLKMER. In other words, he cannot say, "Keep your eyes and ears open and watch out for things and we will come back and check with you tomorrow or the next day"?

Rabbi SAPERSTEIN. Yes. I would not want to see them do that. I would like to see a bar on that kind of relationship. But what is vitally important, I think, is that if we are going to allow the FBI to ask about knowledge of past or existing things, if we are going to allow the FBI to accept, on a volunteer basis, a clergyman as a part-time or full-time informant, then I think the bar against the FBI seeking information that comes from the confessional capacity is terribly important. If you don't have that, then you have the chilling effect of people knowing that some clergy are being informants and that those clergy may be revealing, at the FBI's request, confessional information. I think this would have a truly chilling effect on the first amendment exercise of freedom of religion.

If we go with Mr. Seiberling's scenario, which is what I think we are saying and have been saying, we would want to see a bar against the

FBI requesting information that comes out of the confessional. We would want written into the committee report that it would be expected that they would not in any way, directly or indirectly, encourage violation of the confessional.

Mr. VOLKMER. I agree with that.

Mr. EDWARDS. Time of the gentleman has expired.

Mr. VOLKMER. One question, please, Mr. Chairman, real fast. And that is that I do not agree with the characterization that has been made here of our intelligence community by the gentleman from Ohio, and also perhaps by the gentleman from Illinois. I disagree with that completely and think that even though there have been past errors, that the present agency is attempting to correct those ills. And I disagree with some of the statement made here that this attempt is broader than it necessarily should be.

In other words, I think that this is restrictive in the present law. There is a restriction here. Maybe it doesn't go as far as you perhaps like and maybe the Congress will go further in this restriction. But this is the restriction from what the present law is that is in the bill. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Volkmer. I think I have a better understanding of our problem after listening to you expert witnesses and my colleagues. What this bill is trying to do, and what some of your suggestions are, you are taking a constitutionally flawed problem and then try to regulate it. You can't do that. You are going to get into a lot of trouble. Informants are a violation, constitutionally, of the fourth amendment of the Constitution. It says people are supposed to be secure in their homes and offices and private lives against the intrusions of Government without a warrant.

Now, we are not going to resolve that because, as Father Drinan pointed out, there aren't votes in Congress to require warrants where an informant relationship is created. However, on the other hand, you shouldn't start to chip away at that constitutional problem by exempting this class or this class or this class. You just shouldn't mention it at all, and let the law evolve. I don't see how it would work. There is a very serious constitutional problem in an informant relationship by the Government and private people or religious people or anybody else.

If you people suggest that it should be regulated by saying you can't use you, then that is the sticky garden that we find ourselves in.

I'm just against the provision at all.

Mr. SEIBERLING. There are two recommendations. One, that they shall not request. And two, that they shall not impersonate members of religious organizations. I would think certainly the second does not produce as many problems. It might be hard to get it through in the form of legislation. But that is a different problem.

I think that their position, however, can be perhaps best dramatized if we take the case of the CIA using ministers, foreign missionaries. And I take it your position would be that there is nothing wrong with the CIA contacting a missionary, either when he's returned from a mission or during his mission, and asking him if he knows about certain things. But what you would object to would be that they contact a missionary either before or during his mission and ask him if he will henceforth during that mission report to them regularly on various things going on in the country where he is stationed. Is that the kind of distinction you are making?

Reverend KELLEY. Strictly speaking, I think we would have trouble even with debriefing of furloughed missionaries. I quoted a passage from a Roman Catholic conference of major superiors of men which said:

We deem it necessary to repudiate U.S. governmental involvement with overseas missionaries for intelligence purposes, be that involvement overt or covert, be in in the host country or in debriefing of furloughed missionaries in the United States.

So at least in the case of the CIA, that would not be the case with that organization.

Mr. SEIBERLING. Does everybody agree with that? All the witnesses?

Mr. THOMPSON. I agree with the principle. I think that, again, if a missionary has seen the commission of a crime that is punishable under the laws of the United States, that missionary is obligated to testify about that.

Mr. SEIBERLING. Well, I take it no one objects if a missionary voluntarily wants to go to the CIA, the FBI, or any other official agency?

Rabbi SAPERSTEIN. Correct.

Mr. SEIBERLING. And tell whatever he thinks is appropriate?

Mr. VOLKMER. Will the gentleman yield?

Mr. SEIBERLING. I will in just a second. It seems to me that Father Drinan's concern can be met by requiring that in such cases that they also report, make some analysis to the extent possible as to the credibility, the background, the name, affiliations, and so forth of this person so that somebody can evaluate whether this has really any validity or not. That is what he is concerned about. But I think that can be handled separately from the question of who and how people are interrogated. Yes.

Mr. VOLKMER. I would like to ask along that line, you used the example and I read the statements about the foreign missionaries, the position of all the churches on that. Do you see any distinction being a clergyperson in this country and activities in this country as against a foreign missionary in a foreign country?

Reverend KELLEY. I tried to make the point that the situation is analogous in this sense; that both the missionary and the clergyperson may be attempting to minister to populations, portions of the population to which they would lose their access if they are viewed as potential or actual informants of any law enforcement agency.

Mr. VOLKMER. I can understand that in certain areas, right.

Mr. THOMPSON. There is one other distinction that I would like to make. Missionaries who serve in countries overseas now almost invariably work as partners with indigenous church persons in those countries. And that delicate relationship between a national of the United States and the citizen of the land in which he is working would also be adversely affected if they were thought to be an informant.

Mr. EDWARDS. Rabbi, if you're saying, or anybody is saying that there should be a Federal law prohibiting the use of members of the clergy as informants, then are you not through the back door legitimizing by Federal law the use of other people as informants without a warrant?

Rabbi SAPERSTEIN. I think that what we were asking for a ban on, was the request. We did not ask for a ban on them in that capacity because I think, as Father Drinan—

Mr. VOLKMER. Request for the future and to be used in a future capacity, ongoing.

Rabbi SAPERSTEIN. That that request should be barred, but not that the relationship itself should be prohibited under Federal law, for the reasons that you are saying, which I find quite compelling.

Mr. EDWARDS. You would all be happier if this section just weren't there at all.

Reverend KELLEY. No. Mr. Chairman, I would like to respond to that. The fact that it's a constitutionally ambiguous area is true. And we cannot resolve that ambiguity at this time.

What we are concerned about is that the whole profession of the clergy not be tainted by the ambiguity in the sense that they should be prohibited from being approached, requested, to serve as ongoing informants by the FBI. If that complicates the constitutional situation, so be it. We are trying to protect something important to the churches.

Mr. EDWARDS. I think it does, because if you want a law that says that, then you're through the back door legitimizing their approaching other professions and other people, and it is a constitutionally murky area where some people are bothered by the informant system generally.

Reverend KELLEY. Not being able to clear up all the murk, we would like to clear it up from this one area at least.

Mr. EDWARDS. Are there further questions?

Mr. SEIBERLING. I would just like to make a comment. What this discussion emphasizes in my mind is that it is important that we have some institutions in our society that can establish a relationship of trust with the rest of society.

Certainly we ought to be able to assume that news media are reporting objectively, that their stories are not rigged by Government, that the churches are not tools of the Government and the people can assume that they are, getting facts and that they are getting religious counselling without the long arm of "Big Brother" being involved.

And while law enforcement is also an extremely important part of our society and intelligence gathering part of our needs as a Nation, somewhere we have got to draw some lines. And I think the discussion has probably given you a pretty good impression of the great difficulty we are laboring under in trying to consider all the ramifications of what we do and don't do.

But I think you have made an extremely valuable contribution here to our consciousness. I would hope that the Congress, as a result of recent events, in particular, will begin to realize that there has to be a limit, and to some extent it has to be up to society as a whole to emphasize that there are some things that just aren't done.

In Great Britain they don't have a written constitution, but for generations they have been able to have a civilized society, much more civilized than ours as a matter of fact, because of the sense that there are certain things that just aren't done. And the moral pressure of society and the indignation if government steps beyond its proper bounds is enough usually to keep it within those bounds.

I think we have to bear down very heavily. And sometimes it can't be done legislatively. But this kind of discussion I think helps crystallize in people's minds that you just don't do certain things. That is the real protection against "1984" it seems to me.

If that consciousness is in our mind as legislators, then maybe we can do a better job of trying to protect these scared rights.

Mr. BOYD. Mr. Thompson, if I understand your position, if the embassy involved in the Iranian hostage crisis were located in Washington, and the FBI attempted to locate a local ayatollah sympathetic to its position in order to obtain intelligence about the motivations and intentions of those inside, you would refuse it that opportunity, is that correct?

Mr. THOMPSON. Yes.

Mr. BOYD. You indicated, Rabbi, that it was your view that if this statute were passed, rabbis, priests and ministers would be in open conflict with the Government, is that correct?

Rabbi SAPERSTEIN. Could conceivably be in open conflict.

Mr. BOYD. Is that the case now?

Rabbi SAPERSTEIN. There have been times when clergy have been asked to testify in court, and in States that do not have strong protection of the "clergy lay privilege", where clergy have refused to testify have been subject to contempt citations as a result. That is the kind of dynamics that I would not want to see institutionalized.

Mr. BOYD. Refuse to testify, or refuse to be recruited as informants?

Rabbi SAPERSTEIN. In the case I was giving, refuse to testify.

Mr. BOYD. But the subject of this controversy is informants.

Rabbi SAPERSTEIN. I understand that but the principle is the same: protection of confidential information. There are pressures that can be placed directly on clergymen to pressure them to center a situation where they would become informant and may reveal information regarding other clergy that may put those clergy in a situation where they would face a court subpoena asking for confidential information.

I just think it opens up the possibility of people being in a place where they have to say as a clergyman, "I simply cannot answer your question." However, I recognize that this isn't intrinsic in the informant relationship since you can't require people to be informants. Such a requirement would clearly violate the Constitution. So it isn't intrinsic in that, but I think it opens the possibility for people later on being forced to refuse to answer questions.

Mr. BOYD. Have there been any abuses in the last 5 to 7 years with regard to clergy being forced to act as informants by the FBI?

Rabbi SAPERSTEIN. I'm not aware of any in that capacity. But my knowledge of the full scope of that—

Mr. BOYD. So far as any of you know there have been no abuses in the last 5 to 7 years which would mandate the change that you are asking for?

Reverend KELLEY. Depends on the definition of an informant.

Mr. BOYD. Well, the definition we have been discussing for the last 45 minutes I think has to do with the ongoing use of a member of the clergy to collect information which would be used by the FBI or other intelligence groups for the purpose of a continuing criminal investigation.

Reverend KELLEY. There have been several instances such as Rabbi Saperstein described. Paul Boe, for instance, was present at the occupation of Wounded Knee and was asked to give information.

Mr. BOYD. That's not the same thing as being asked to be used as an informant, is it? Being asked to give information, I assume pursuant to a subpoena, is not the same thing, as I understand it, as being asked to be an ongoing informant as an employee to the FBI.

Reverend KELLEY. There is another instance I'm aware of. I don't know whether it was a recruited informant. But we obtained under the Freedom of Information Act documents from the FBI showing that in the mid-1960's there was in the National Council of Churches a person who supplied information on the letterhead of the National Council of Churches to the FBI about persons working in the Mississippi Delta during the civil rights struggles. I do not know whether that person was recruited as an informant. I didn't try to find out who it was.

Mr. BOYD. That could be anywhere from 10 to 15 years ago, couldn't it? Rabbi Saperstein, do you view relationships with certain professions, that is, the law, medicine, news media, and the clergy, as coming under the protection of the first amendment? I take it you do from what you have said.

Rabbi SAPERSTEIN. Right.

Mr. BOYD. Are there any Supreme Court cases which uphold your point of view?

Rabbi SAPERSTEIN. I think I made clear what the situation was.

Mr. BOYD. So there are no Court decisions.

Rabbi SAPERSTEIN. I don't know of any. The Supreme Court has not taken an absolutist position on the first amendment. That is absolutely clear. I think there have been situations where the Supreme Court has upheld certain confidences and confidential information that conceivably could become an issue in an informant relationship.

But since you can't force someone to be an informant your point is well taken. They cannot require people to be informants as opposed to the testimony situation where they can require people under the threat of contempt of court to testify. I think that is a valid distinction.

I just say that once you set the process in motion you run into danger of moving into that second category.

Mr. BOYD. All I'm suggesting is that the relationship between the professions which are listed under this subheading and their utilization as informants is dictated by Congress, not the Constitution.

I yield back my time. Thank you, Mr. Chairman.

Mr. EDWARDS. Ms. Cooper.

Ms. COOPER. Thank you. I just have one question. If I understand the main thrust of your testimony, it was that your primary concern was the effect that any informing or appearance of informing has on the relationship with your parishioners and general public, and tends—even the suspicion of that kind of activity tends to erode the process of consultation. If that is the case, what difference does it make whether or not the FBI is requesting your or the clergy are volunteering the information?

It seems to me that the way the information gets to the FBI, the fact that—the fact is that the public at large, the clergy, we'll wind up with the same conclusion, that they cannot trust their clergy.

Mr. THOMPSON. Let me begin by saying we have not suggested that the clergy volunteer information that is gained in this confidential relationship. We have indicated that the clergy might properly volunteer firsthand direct evidence of criminal activity. The difference that I perceive between such voluntary coming forward and the provisions of this statute are exactly the ones that have been described.

Namely that the statute permits the FBI to request an individual to do the sort of thing on a continuing basis into the future. That is the aspect of the statute that I at least find most objectionable.

Ms. COOPER. Let me follow up, because it seems to me that you're making a distinction that isn't there. That at least in the minds of your parishioners which is as we said the most important thing. That is, that for example, a priest who works in East Harlem.

What he does in the church and what he finds out on the street makes no difference, as far as whether or not he relays that information to the police and its effect upon the degree of trust that the people in that community feel toward him.

Other than perhaps the fact that he was standing on a street corner and saw a shooting or something like that, which is clearly outside of his role as a priest, anything else that he might learn, he gains precisely because of the trust the parishioners have in him as a priest.

The fact that he gains that in a way that may not technically be through a confessional type relationship seems to me the thrust of your testimony is to protect that kind of information from being relayed to the police and FBI also.

Rabbi SAPERSTEIN. This is a difficulty that good people face when two moral principles are in tension with each other. We have here a situation where two moral principles are in tension with each other: The clergy person exercising the right to do what they feel they should do is in tension with the separation of church and state and the responsibility of that clergy person to the parishioner. These things pull at each other in different directions. We have to find a way which, while not perfect, will minimize the costs as opposed to the benefits of such a situation.

We will not solve all the problem of trust, assuming we don't bar people from volunteering to be informants. You minimize but don't solve that problem. But that then becomes an internal problem to the religious community. But at least a priest and minister and rabbi cannot say, when brought up on disciplinary action within the religious community, "Well, I was pressured by the FBI to violate the confessional to violate what was said to me in confidence," I don't mean of course, just the technical confessional. I mean all clergy lay confidential communication that is. Anytime one says when one comes to the clergy person and indirectly states, "I am revealing something to you, because you are a clergy person," on the assumption that there is a trust. And the clergy person does not at that point say to them, "Look, I want you to know I am an informant for the FBI and you cannot rely on that trust."

When they allow the clergy to do that, that is what I call confessional activity. I believe that the FBI should be barred from requesting that such confidences be violated. The presumption in law should be that it will not be violated. You can't stop someone from doing it, but the presumption shall be to the contrary, so we will do as much as possible to instill confidence. It should be clear that under law the FBI did not induce the clergy to do that. And, in fact, the clergy then holds the responsibility on his own shoulders for violating confidences, and is subject to whatever strictures the religious faith will impose on the clergy for doing it.

It is not a cure-all and not a panacea, but I think balancing out all the concerns expressed this morning, it's probably the best we have.

Mr. EDWARDS. Mr. Boyd?

Mr. BOYD. When was the last time a clergyman was pressured, as you have just described, to become an informant, Rabbi?

Rabbi SAPERSTEIN. My not being able to answer several of these questions you have tossed at me does not—by the very nature of the secretive process of FBI informant practice—does not mean it hasn't happened. I don't know. Let's say it has not happened, arguendo. It doesn't mean that it can't happen, that it might not happen in the future. Indeed although existing law says nothing about it, it will to a certain extent be legitimized by the provisions now being recommended. Maybe that will further the probabilities that such violations will take place. What we want to do is minimize the chance of it happening. If it hasn't happened, and I hope it hasn't happened until now, well then, how much more so it is important to try to enact into law stipulations and provisions that will minimize its happening in the future, so we can continue the kind of relationship between church and state that is appropriate.

Mr. EDWARDS. I don't want to repeat myself more than a few times, but when you ask us to pass this law, and that is what you are asking, us to pass a law that says that the FBI can't approach members of the clergy to ask they be an informant, everybody in the room strongly disapproves of them approaching members of the clergy to ask them to be informants, no doubt about that. But programs, you ought to be able to handle that yourselves and not ask the Federal Government to step in, because if we pass a law to that effect, you are legitimizing by that law the informant system. And that bothers me. It doesn't bother you?

Rabbi SAPERSTEIN. It bothers us very much. I think what has been said this morning by everyone here is that in balancing out those two things, that we tend to come down on the other side. All of us share your concerns on this. We are significantly fearful about this—we would not want to legitimize it.

The point Dean Kelley made was that it is legitimized now. Our saying we are going to carve out a certain area of informant activity and place regulations on it does not necessarily mean that we say that where there aren't similar restrictions in other informant activity, that we approve of the status quo. All that can be reasonably and rationally interpreted from our position is that in this area where we have spoken, what we have said ought to be heard for what it says and no more. That is the nature of the limited restrictions we seek here.

I would hope this committee is familiar with our constant and repeated plea for further civil liberties protections vis-a-vis the informant system in general. Many religious groups have spoken out on that. The fact that we establish protections on this area here does not necessarily mean we legitimize all other things where there aren't similar protections.

Mr. EDWARDS. Schoolteachers snitching on their students. That is a problem too.

We thank the witnesses very much for a very informative session. It's really been helpful to us.

Thank you very much.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]



## APPENDIXES

## APPENDIX 1

I

96TH CONGRESS  
1ST SESSION**H. R. 5030**

To create a charter for the Federal Bureau of Investigation, and for other purposes.

## IN THE HOUSE OF REPRESENTATIVES

JULY 31, 1979

Mr. RODINO (for himself, Mr. McCLORY, Mr. HYDE, and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

**A BILL**

To create a charter for the Federal Bureau of Investigation, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Federal Bureau of Inves-  
4       *tigation Charter Act of 1979".*

5       SEC. 2. Chapter 33 of title 28, United States Code, is  
6       amended to read as follows:

1                   **"CHAPTER 33—FEDERAL BUREAU OF**  
 2                   **INVESTIGATION CHARTER**

**"SUBCHAPTER I—PURPOSES; PRINCIPLES; DEFINITIONS**

"Sec.

"531. Statement of purposes.

"531a. General principles.

"531b. Definitions.

**"SUBCHAPTER II—THE FEDERAL BUREAU OF INVESTIGATION;  
 DIRECTOR; DUTIES OF THE DIRECTOR**

"532. The Federal Bureau of Investigation.

"532a. Director of the Federal Bureau of Investigation.

"532b. Duties of the Director.

"532c. General powers and duties.

**"SUBCHAPTER III—CRIMINAL INVESTIGATIONS**

"533. Investigation of criminal matters.

"533a. Attorney General guidelines for investigation of criminal matters.

"533b. Restrictions on certain investigative techniques.

"533c. Retention, dissemination, and destruction of information.

**"SUBCHAPTER IV—UNDERCOVER OPERATIONS**

"534. Authorization of undercover operations.

**"SUBCHAPTER V—CIVIL AND OTHER INVESTIGATIONS**

"535. Investigation of civil matters.

"535a. Collection of information on civil disorders and public demonstrations requiring Federal assistance.

"535b. Background investigations by Federal Bureau of Investigation of appointees, applicants, and employees.

"535c. FBI assistance in background inquiries by other Federal agencies.

"535d. Special service functions.

**"SUBCHAPTER VI—LAW ENFORCEMENT SUPPORT FUNCTIONS**

"536. Education, training, and research.

"536a. Foreign liaison.

"536b. Technical assistance.

"536c. Cooperation with the Secret Service.

"536d. Identification, criminal history, and other records; exchange for criminal justice purposes.

"536e. Identification, criminal history, and other records; exchange for employment or licensing purposes.

"536f. Retention of unsolicited information.

**"SUBCHAPTER VII—MISCELLANEOUS**

**"537. Civil fines and penalties.**

**"537a. Civil remedies; nonlitigability of guidelines and procedures.**

**"537b. Protection of the investigative process.**

**"537c. Congressional oversight and accountability of the FBI.**

**"537d. Periodic review of guidelines.**

1       **"SUBCHAPTER I—PURPOSES; PRINCIPLES;**

2                               **DEFINITIONS**

3       **"§ 531. Statement of purposes**

4               **"The purposes of this chapter are—**

5               **"(1) to define the duties and responsibilities of the**  
6               **Federal Bureau of Investigation (FBI) except as to for-**  
7               **ign intelligence collection and foreign counterintelli-**  
8               **gence investigations;**

9               **"(2) to confer upon the FBI and to codify the**  
10              **statutory authority necessary to discharge those duties**  
11              **and responsibilities; and**

12              **"(3) to establish procedures for the discharge of**  
13              **those duties and responsibilities.**

14       **"§ 531a. General principles**

15              **"(a) GENERAL RULE.—All authorities, duties, and re-**  
16              **sponsibilities of the FBI, except those specified in Executive**  
17              **Order Numbered 12036, dated January 24, 1978, concern-**  
18              **ing the foreign counterintelligence and foreign intelligence**  
19              **activities of the FBI, or successor orders, shall be exercised**  
20              **in accordance with the provisions of this chapter and any**  
21              **other applicable law.**

1       “(b) **MINIMAL INTRUSION.**—The FBI shall conduct in-  
2       vestigations with minimal intrusion consistent with the need  
3       to collect information or evidence in a timely and effective  
4       manner.

5       “(c) **INVESTIGATION OF CRIMINAL CONDUCT ONLY.**—  
6       The FBI, in conducting an investigation pursuant to sub-  
7       chapter III, shall be concerned only with conduct and only  
8       such conduct as is forbidden by a criminal law of the United  
9       States or State criminal law encompassed by section  
10      533(b)(3) of this chapter, pertaining to investigation of terror-  
11      ist activity.

12      “(d) **LIMITATIONS.**—The FBI shall not conduct an in-  
13      vestigation solely on the basis of—

14           “(1) a religious or political view lawfully ex-  
15           pressed by an individual or group,

16           “(2) the lawful exercise of the right to peaceably  
17           assemble and to petition the Government, or

18           “(3) the lawful exercise of any other right secured  
19           by the Constitution or laws of the United States.

20      **“§531b. Definitions**

21      **“As used in this chapter—**

22           “(1) ‘aggravated property destruction’ means sig-  
23           nificant damage to property or to a public facility, or  
24           the interruption or impairment of a public facility,  
25           through the use of a destructive device;

## 5

1           “(2) ‘criminal history information’ means informa-  
2           tion compiled by a criminal justice agency concerning  
3           an individual, consisting of notations of arrest, deten-  
4           tion, indictment, information, or other formal criminal  
5           charge, together with any disposition thereof;

6           “(3) ‘destructive device’ means an explosive, an  
7           incendiary material, a poisonous or infectious material  
8           in a form that can be readily used to cause serious  
9           bodily injury, or a material that can be used to cause a  
10          nuclear incident as defined in section 11(q) of the  
11          Atomic Energy Act of 1954 (42 U.S.C. 2014(q)) and  
12          includes a bomb, grenade, mine, rocket, missile, or  
13          similar device containing an explosive, an incendiary  
14          material, or a material that can be used as a chemical,  
15          biological, or radiological weapon;

16          “(4) ‘Director’ means the Director of the FBI;

17          “(5) ‘enterprise’ means—

18                 “(A) a partnership, corporation, association,  
19                 or other such entity; or

20                 “(B) two or more individuals associated in  
21                 fact for a common purpose whether or not they  
22                 are a legal entity;

23          “(6) ‘guidelines’ means written statements issued  
24          by the Attorney General establishing investigative  
25          policy for the FBI;

## 6

1           “(7) ‘informant’ means any person or entity which  
2       furnishes information to the FBI on a confidential  
3       basis;

4           “(8) ‘mail cover’ means any systematic and delib-  
5       erate inspection of the exterior of mail in United States  
6       postal channels, prior to delivery of such mail to the  
7       addressee, and the recording of information thereon;

8           “(9) ‘pattern of terrorist activity’ means two or  
9       more separate terrorist acts that—

10           “(A) have the same participants or methods  
11       of commission or have similar victims or other  
12       characteristics that create the appearance of an  
13       interrelationship; and

14           “(B) are committed for the purpose of influ-  
15       encing or retaliating against the policies or ac-  
16       tions of the Government of the United States or  
17       any State or political subdivision thereof or of any  
18       foreign state, by intimidation or coercion;

19           “(10) ‘procedures’ means internal rules, directives  
20       or regulations, or manuals promulgated by the Director  
21       of the FBI;

22           “(11) ‘proprietary’ means a sole proprietorship,  
23       partnership, corporation, or other business entity that  
24       is owned or controlled by the FBI and used by the  
25       FBI in connection with undercover operations but

1       whose relationship with the FBI is not generally ac-  
2       knowledgeed;

3       “(12) ‘racketeering activity’ means activity that  
4       involves a violation of title 18, United States Code,  
5       sections 1961 through 1968, or a violation incorporat-  
6       ed in section 1961(1) of title 18, United States Code;

7       “(13) ‘State’ means a State of the United States,  
8       the District of Columbia, or a geographical area out-  
9       side a State of the United States that is established  
10      under the Constitution or laws of the United States;  
11      and

12      “(14) ‘terrorist activity’ means activity that in-  
13      volves a violent act that is dangerous to human life or  
14      risks serious bodily harm or that involves aggravated  
15      property destruction, for the purpose of coercion or in-  
16      timidation.

17   **“SUBCHAPTER II—THE FEDERAL BUREAU OF**  
18       **INVESTIGATION; DIRECTOR; DUTIES OF THE**  
19       **DIRECTOR**

20   **“§ 532. The Federal Bureau of Investigation**

21       “The FBI is in the Department of Justice and shall  
22      discharge its duties and responsibilities under the general  
23      policy control, general direction, and supervision of the At-  
24      torney General, and, to the extent the Attorney General  
25      directs, the Deputy Attorney General.

1 **"§ 532a. Director of the Federal Bureau of Investigation**

2       “(a) **DIRECTOR.**—There shall be a Director at the head  
3 of the FBI.

4       “(b) **REPORT TO ATTORNEY GENERAL.**—The Director  
5 shall report to the Attorney General and, to the extent the  
6 Attorney General so designates, the Deputy Attorney  
7 General.

8       “(c) **APPOINTMENT AND TERM.**—The President shall  
9 appoint the Director, by and with the advice and consent of  
10 the Senate, for a term of ten years. A Director may not serve  
11 more than one ten-year term.

12 **"§ 532b. Duties of the Director**

13       “The Director of the FBI, under the general supervi-  
14 sion and direction of the Attorney General, shall—

15           “(1) ensure that the duties and responsibilities of  
16 the FBI are carried out in accordance with the provi-  
17 sions of this chapter, the guidelines and procedures  
18 promulgated pursuant to this chapter, and with the  
19 Constitution and laws of the United States;

20           “(2) promulgate such procedures as are necessary  
21 to carry out the provisions of this chapter;

22           “(3) establish an effective system for imposing ad-  
23 ministrative sanctions for failure to comply with the  
24 provisions of this chapter and guidelines and proce-  
25 dures adopted pursuant to this chapter; and

1           “(4) ensure that the law enforcement activities  
2           and other functions of the FBI are properly and effi-  
3           ciently directed, regulated, coordinated, and adminis-  
4           tered.

5   **“§ 532c. General powers and duties**

6           “(a) GENERAL AUTHORITY.—The Director, Associate  
7   Director, an Assistant to the Director, Assistant Director,  
8   Inspector, and Agent of the FBI may—

9           “(1) carry a firearm;

10          “(2) investigate a violation of a law of the United  
11       States or any other matter encompassed by the provi-  
12       sions of this chapter;

13          “(3) execute an order, warrant, subpoena, investi-  
14       gative demand, or other process issued under the au-  
15       thority of the United States for arrest, search, or seiz-  
16       ure, or production of evidence;

17          “(4) make an arrest without a warrant for an of-  
18       fense against the United States committed in his pres-  
19       ence, or for a felony cognizable under the laws of the  
20       United States committed outside his presence if he has  
21       reasonable grounds to believe that the person to be ar-  
22       rested has committed or is committing a felony;

23          “(5) offer and pay a reward for services or infor-  
24       mation assisting in the detection or investigation of the

1       commission of a violation of the criminal laws of the  
2       United States or the apprehension of an offender; and

3       “(G) perform any other lawful duty that the Attor-  
4       ney General may direct, consistent with this chapter.

5       “(b) PROCEDURES FOR UNFORESEEN EMERGEN-  
6       CIES.—Appropriations for the FBI are available for expenses  
7       of unforeseen emergencies of a confidential character, where  
8       appropriations are provided, to be spent under the direction  
9       of the Attorney General. The Attorney General shall certify  
10      the amount spent and his certification, to be filed in the rec-  
11      ords of the Department of Justice, is a sufficient voucher for  
12      the amount therein expressed to have been spent.

13      “SUBCHAPTER III—CRIMINAL INVESTIGATIONS

14      “§ 533. Investigation of criminal matters

15      “(a) GENERAL AUTHORITY TO INVESTIGATE.—The  
16      FBI is authorized to make inquiries to determine whether  
17      there is a basis for investigation and to conduct investigations  
18      for the detection, prevention, and prosecution of violations of  
19      the criminal laws of the United States, except violations for  
20      which responsibility is by law assigned solely to another in-  
21      vestigative agency.

22      “(b) BASIS FOR EXERCISE OF AUTHORITY.—

23      “(1) INVESTIGATION OF GENERAL CRIMES.—The  
24      FBI is authorized to conduct an investigation on the  
25      basis of facts or circumstances that reasonably indicate



1           “(iii) influencing or retaliating against  
2           the trade or economic policies or actions of a  
3           corporation or other entity engaged in for-  
4           eign commerce, by intimidation or coercion;  
5           and

6           “(B) such purpose is to be accomplished  
7           wholly or in part through—

8           “(i) terrorist activity in violation of a  
9           criminal law of the United States;

10           “(ii) a pattern of terrorist activity in  
11           violation of the criminal law of a State; or

12           “(iii) terrorist activity by an enterprise  
13           whose membership is based wholly or in part  
14           in the United States that—

15           “(I) occurs totally outside the  
16           United States or transcends a national  
17           boundary in terms of the means by  
18           which the terrorist activity is accom-  
19           plished, the persons the terrorist activi-  
20           ty appears intended to coerce or intimi-  
21           date, or the locale in which the perpe-  
22           trators operate or seek asylum; and

23           “(II) would constitute a criminal  
24           violation if committed within the juris-

1                   diction of the United States or any  
2                   State.

3   **"§533a. Attorney General guidelines for investigation of**  
4                   **criminal matters**

5           "(a) **PROMULGATION OF GUIDELINES.**—The Attorney  
6   General, as soon as feasible after enactment of this chapter,  
7   shall promulgate guidelines for inquiries and investigations  
8   conducted pursuant to section 533, that embody the princi-  
9   ples that—

10           "(1) each investigation shall focus on criminal ac-  
11   tivity for the purposes of detection, prevention, and  
12   prosecution of crime;

13           "(2) each investigation shall be conducted on the  
14   basis of facts or circumstances that can be reviewed  
15   and evaluated; and

16           "(3) the scope and intensity of each investigation  
17   shall be determined by the nature and quality of infor-  
18   mation on which the investigation is based.

19           **"(b) REVIEW OF INVESTIGATION OF TERRORIST AC-**  
20   **TIVITY.**—The Department of Justice shall be advised of all  
21   investigations initiated pursuant to section 533(b)(3). If any  
22   such investigation continues beyond one year it shall be re-  
23   viewed at least annually by the Director and a report of such  
24   review shall be submitted to the Attorney General or his  
25   designee.

1 **"§ 533b. Restrictions on certain investigative techniques**

2       **"(a) GENERAL RESTRICTIONS.—**The investigative  
3 techniques described in this section shall be used only as per-  
4 mitted by this chapter and by guidelines established by the  
5 Attorney General. These guidelines shall protect constitu-  
6 tional rights and personal privacy, and shall ensure that—

7               **"(1)** investigations are conducted with minimal in-  
8 trusion consistent with the need to collect information  
9 or evidence in a timely, effective manner;

10              **"(2)** as the likelihood for intrusion into privacy in-  
11 creases through the specific use of techniques, more  
12 formalized and higher level authorization and review  
13 procedures are required; and

14              **"(3)** information obtained in the course of an in-  
15 vestigation is used only for lawful governmental pur-  
16 poses.

17       **"(b) INFORMANTS AND UNDERCOVER AGENTS.—**The  
18 FBI is authorized to use informants and undercover Agents  
19 subject to the following restrictions:

20              **"(1)** An informant may be requested to collect in-  
21 formation about an identifiable person on a continuing  
22 basis in a criminal investigation when a supervisory  
23 FBI official makes a written finding that the informant  
24 appears suitable for such use and that the information  
25 likely to be obtained is pertinent to and within the

1 scope of investigative activity authorized by this chap-  
2 ter. Such finding shall be made in accordance with ap-  
3 plicable guidelines and shall be reviewed periodically  
4 by the Director or his designee.

5       “(2)(A) The FBI shall advise each informant ap-  
6 proved pursuant to paragraph (1) that he is neither an  
7 Agent nor employee of the FBI and that his relation-  
8 ship with the FBI will not protect him from arrest or  
9 prosecution for any violation of Federal, State, or local  
10 law, and that the FBI will not sanction his participa-  
11 tion in criminal activity except insofar as a supervisory  
12 FBI or Justice Department official determines pursu-  
13 ant to clause (B) that his participation in criminal ac-  
14 tivity is justified. Each informant shall be advised that  
15 in carrying out his assignments he shall not participate  
16 in crimes of violence, use unlawful techniques to obtain  
17 information for the FBI, or initiate a plan to commit  
18 criminal acts.

19       “(B) In making the determination that participa-  
20 tion is justified, the official shall determine in writing  
21 that the conduct is necessary to obtain information or  
22 evidence for prosecutive purposes or to prevent or  
23 avoid death or serious bodily injury and that this need  
24 outweighs the seriousness of the conduct involved,  
25 except that the use of unlawful techniques to collect in-

1       formation or initiation of a plan to commit criminal  
2       acts shall not be permitted. The Director or his designee shall at least annually review the determinations  
3       made under this subsection.  
4

5       “(3) The FBI may request any person under an  
6       obligation of legal privilege of confidentiality, including  
7       a licensed physician, a person who is admitted to practice in a court of a State as an attorney, a practicing  
8       clergyman, or a member of the news media, to collect  
9       information as an informant pursuant to this subsection  
10      if—  
11

12               “(A) expressly authorized in writing by the  
13      Director or a designated senior official of the FBI;

14               “(B) the Attorney General or his designee is  
15      promptly notified of the authorization in writing  
16      or an oral notification is promptly confirmed in  
17      writing; and

18               “(C) the person is advised that in seeking information from him, the FBI is not requesting the  
19      person to breach any legal obligation of confidentiality which such person may be under.  
20  
21

22       “(4)(A) The FBI shall conduct preliminary inquiries concerning any person who is being considered for  
23      use as an informant under this subsection or who may  
24      be requested to provide operational assistance to the  
25

1 FBI in order to determine such person's suitability for  
2 such assignment or assistance, if such collection does  
3 not involve the use of any investigative technique de-  
4 scribed in subsection (d), (c), (f), or (g).

5 "(B) The FBI shall determine in a timely manner  
6 whether such person will be used as an informant or  
7 requested to provide operational assistance to the FBI.  
8 If it is determined that such person will not be used in  
9 such manner, any information collected under subpara-  
10 graph (A) without the consent of such person shall be  
11 promptly destroyed unless it is or may become perti-  
12 nent to an investigation authorized by this chapter or  
13 the person is a potential witness in a criminal  
14 prosecution.

15 "(5)(A) Undercover Agents shall be assigned only  
16 for investigations authorized by section 533 of this  
17 chapter. Each undercover operation shall be approved  
18 by an appropriate supervisory official of the FBI. In  
19 carrying out an undercover assignment, each FBI em-  
20 ployee used as an undercover Agent is bound by the  
21 provisions of this chapter and other laws, procedures,  
22 and guidelines governing the conduct of FBI Agents.  
23 In carrying out his assignment, no undercover Agent  
24 shall participate in any activity proscribed by Federal,  
25 State, or local law except—

1           “(i) to obtain information or evidence neces-  
2           sary for paramount prosecutive purposes;

3           “(ii) to establish and maintain credibility or  
4           cover with persons associated with the criminal  
5           activity under investigation; or

6           “(iii) to prevent or avoid death or serious  
7           bodily injury or danger thereof to himself or an-  
8           other.

9           “(B) A written report of such participation shall  
10          be made to an appropriate supervisory official of the  
11          FBI and specific approval obtained if the Agent is to  
12          participate in a serious criminal act that is not an inte-  
13          gral part of the undercover operation or was not au-  
14          thorized at the time the operation was approved.

15          “(C) The exceptions established in clauses (i), (ii),  
16          and (iii) may not under any circumstances authorize an  
17          undercover Agent to use investigative techniques in  
18          violation of the provisions of this chapter to obtain in-  
19          formation or evidence, or to initiate a plan to commit  
20          criminal acts.

21          “(6) The FBI may use an informant or undercover  
22          Agent to infiltrate a group under investigation or  
23          may recruit a person from within such a group as an  
24          informant. If the group is under investigation pursuant  
25          to section 533(b)(3), a senior official of the FBI shall

1 make a written finding to the Director that such infil-  
2 tration or recruitment is necessary and meets the re-  
3 quirements of this chapter and applicable procedures  
4 and guidelines. The finding shall include a statement of  
5 means reasonably designed to minimize the acquisition,  
6 retention, and dissemination of information that does  
7 not relate to the matter under investigation or to any  
8 other investigative activity authorized by this chapter.

9       “(7) Evidence of violations of criminal law by an  
10 informant contrary to the instructions provided in para-  
11 graph (2) which comes to the attention of the FBI  
12 shall be promptly reported in writing to the Depart-  
13 ment of Justice if it involves a Federal offense, or dis-  
14 closed to the appropriate investigative or prosecutive  
15 authorities of the State or political subdivision having  
16 jurisdiction unless the Attorney General or his desig-  
17 nee approves nondisclosure. Evidence of violations of  
18 the criminal law by an undercover Agent contrary to  
19 the provisions of paragraph (5) which comes to the at-  
20 tention of the FBI shall be promptly reported in writ-  
21 ing to the Department of Justice.

22       “(c) **PHYSICAL SURVEILLANCE.**—The FBI may direct  
23 physical surveillance against an identifiable individual only  
24 for the purpose of and within the scope of investigative activ-  
25 ity authorized by this chapter.

1       “(d) MAIL SURVEILLANCE.—A mail opening may be  
2 authorized only pursuant to applicable statutes. A mail open-  
3 ing or mail cover may be conducted by or on behalf of the  
4 FBI only pursuant to United States Postal Service regula-  
5 tions.

6       “(e) ELECTRONIC SURVEILLANCE.—The FBI may  
7 conduct electronic surveillance only in accordance with appli-  
8 cable law.

9       “(f) ACCESS TO THIRD PARTY RECORDS.—

10           “(1) The FBI may have access to, or obtain  
11 copies of records identifiable to an individual, if the  
12 records are toll records from a communications  
13 common carrier, or insurance records from a licensed  
14 insurance carrier, agent, or broker, or records from a  
15 credit institution not otherwise encompassed by the  
16 Right to Financial Privacy Act of 1978 (12 U.S.C.  
17 3401) or may have access to information contained in  
18 such records, only if the records are reasonably de-  
19 scribed and—

20           “(A) the individual with whom the records  
21 are identifiable authorized the disclosure;

22           “(B) the records are disclosed in response to  
23 an investigative demand that meets the require-  
24 ments of paragraph (4); or

1           “(C) the records are disclosed in response to  
2           a judicial subpoena, or to a court order issued in  
3           connection with proceedings before a grand jury.

4           “(2) The FBI may issue an investigative demand  
5           for access to the records of a ‘financial institution’, as  
6           defined in section 1101 of the Right to Financial Pri-  
7           vacy Act of 1978 (12 U.S.C. 3401), which shall be  
8           used only in accordance with the provisions of section  
9           1105 of that Act (12 U.S.C. 3405), and guidelines es-  
10          tablished by the Attorney General.

11          “(3) The FBI may issue an investigative demand  
12          to obtain records described in paragraph (1) if—

13                 “(A) there is reason to believe that the rec-  
14                 ords sought are relevant to an investigation con-  
15                 ducted pursuant to section 533;

16                 “(B) except as provided in paragraph (5), a  
17                 copy of the investigative demand has been served  
18                 upon the individual whose records are sought or  
19                 mailed to his last known address on or before the  
20                 date on which the demand was served on the in-  
21                 stitution holding the records together with a  
22                 notice that states with reasonable specificity the  
23                 nature of the investigation.

24          “(4) An investigative demand shall not—

1           “(A) contain any requirement which would  
2           be unreasonable if contained in a subpoena duces  
3           tecum issued by a court of the United States in  
4           aid of a grand jury investigation; or

5           “(B) require the production of a record that  
6           would be privileged from disclosure if demanded  
7           by a subpoena duces tecum issued by a court of  
8           the United States in aid of a grand jury investiga-  
9           tion.

10          “(5) The Attorney General or his designee may  
11          delay the notice required under paragraph (3)(B) for  
12          one or more successive periods, not to exceed ninety  
13          days each, if he makes a written finding that—

14               “(A) the investigation being conducted is  
15               within the lawful jurisdiction of the FBI;

16               “(B) there is reason to believe that the rec-  
17               ords sought are relevant to a lawful investigation  
18               pursuant to section 533; and

19               “(C) there is reason to believe that such  
20               notice will result in—

21                       “(i) endangering the life or physical  
22                       safety of any person;

23                       “(ii) flight from prosecution;

24                       “(iii) destruction of or tampering with  
25                       evidence;

1                   “(iv) intimidation of a potential witness;

2                   or

3                   “(v) otherwise seriously jeopardizing an  
4                   investigation or unduly delaying a trial or  
5                   ongoing official proceeding to the same  
6                   extent as would a circumstance described in  
7                   clause (i), (ii), (iii), or (iv).

8           A request for delay and any written findings made by  
9           the Attorney General or his designee shall be made  
10          with reasonable specificity.

11          “(6) Any person who is the subject of a record  
12          who receives notice of an investigative demand may,  
13          within ten days from the date of service or fourteen  
14          days from the date of mailing of that notice, challenge  
15          the issuance of the demand before a United States  
16          magistrate on the grounds that the records are not rel-  
17          evant to a lawful investigation or on any other legal  
18          basis for objecting to the release of the records.

19          “(7) A custodian upon whom an investigative  
20          demand has been duly served shall make the records  
21          available to the FBI for inspection and copying or re-  
22          production at the principal place of business of the re-  
23          cipient of the demand or the location of the records, or  
24          at such other place as the demand shall specify, on the  
25          return date specified. If the demand contains the find-

1       ing described in paragraph (5) of this subsection, he  
2       shall take reasonable steps to prevent disclosure to the  
3       subject of the material of the issuance of the demand  
4       or compliance therewith.

5       “(8) The Attorney General or an attorney for the  
6       Government may file with the United States magis-  
7       trate for the judicial district in which the custodian re-  
8       sides, is found, or transacts business, a petition for an  
9       order enforcing the demand. The United States magis-  
10      trate shall have jurisdiction to hear and decide such pe-  
11      titions and enter appropriate orders, and no appeal  
12      shall lie from such decision or order.

13      “(9) No cause of action shall lie in any court  
14      against any person, corporation, partnership, associ-  
15      ation, or other entity, or against the officers, or em-  
16      ployees of such an entity, by reason of good-faith reli-  
17      ance upon an investigative demand issued by the FBI  
18      in accordance with this section.

19      “(10) The notice requirements of paragraph (3)(B)  
20      shall not apply when the FBI is seeking only the  
21      name, address, account number, or type of account of  
22      any individual or ascertainable group of individuals as-  
23      sociated with toll records, credit records, or insurance  
24      records.

## 25

1           “(11) Nothing in this subsection shall apply when  
2       records are sought by the FBI under the Federal  
3       Rules of Civil Procedure or the Federal Rules of  
4       Criminal Procedure or comparable rules of other courts  
5       in connection with litigation to which the Government  
6       and the person whose records are sought are parties.

7       “(g) ACCESS TO TAX INFORMATION.—The FBI may  
8       obtain access from the Internal Revenue Service of the  
9       United States Treasury Department to a return, return infor-  
10      mation, or taxpayer return information as defined in section  
11      6103(b) (1), (2), and (3), respectively, of the Internal Reve-  
12      nue Code of 1954 (26 U.S.C. 6103 (b)(1), (b)(2), and (b)(3))  
13      only in accordance with the confidentiality and disclosure  
14      provisions of section 6103 of the Internal Revenue Code of  
15      1954 (26 U.S.C. 6103), and the regulations promulgated  
16      thereunder.

17      “(h) OTHER SENSITIVE INVESTIGATIVE TECH-  
18      NIQUES.—The FBI may use other sensitive investigative  
19      techniques, such as trash covers, pen registers, consensual  
20      monitoring, electronic location detectors, covert photographic  
21      surveillance, and pretext interviews only in the course of a  
22      lawful investigation conducted pursuant to section 533,

1   **"§ 533c. Retention, dissemination, and destruction of in-**  
2                   **formation**

3           **"(a) RETENTION OF INFORMATION.—**The FBI may  
4 retain information collected pursuant to this chapter if it is  
5 relevant to an investigation or pertinent to and within the  
6 scope of an authorized law enforcement activity or other re-  
7 sponsibility of the FBI conferred by this chapter.

8           **"(b) DISSEMINATION OF INFORMATION.—**The FBI,  
9 pursuant to guidelines established by the Attorney General  
10 and consistent with the provisions of sections 552 and 552a  
11 of title 5, United States Code, may disseminate information  
12 obtained during an investigation conducted pursuant to sec-  
13 tion 533 to another Federal agency or to a State or local  
14 criminal justice agency if such information—

15           **"(1)** falls within the investigative jurisdiction or  
16           litigative responsibility of the agency;

17           **"(2)** may assist in preventing a crime or the use  
18           of violence or any other conduct dangerous to human  
19           life;

20           **"(3)** reflects on the integrity of a member of a  
21           criminal justice agency;

22           **"(4)** is required to be disseminated to a Federal  
23           agency pursuant to Executive Order Numbered 10450,  
24           as amended, dated April 27, 1953, or a successor  
25           order or other law; or

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1           “(5) is otherwise permitted to be disseminated  
2           pursuant to section 552a of title 5, United States  
3           Code, Executive Order Numbered 10450, as amended,  
4           dated April 27, 1953, or any other law.

5           “(c) DESTRUCTION OF INFORMATION.—The FBI shall  
6           destroy records compiled in connection with an investigation  
7           conducted pursuant to section 533 or deposit them in the  
8           Archives of the United States for historic preservation pursu-  
9           ant to section 2103 of title 44, United States Code, ten years  
10          after the termination of the investigation if there is no pros-  
11          ecution or ten years after termination of prosecution unless—

12           “(1) retention of the record is necessary to the  
13          conduct of pending or anticipated litigation;

14           “(2) the record is the subject of a pending request  
15          for access under a provision of section 552 or 552a of  
16          title 5, United States Code;

17           “(3) retention of the record is required by chapter  
18          119 of title 18, United States Code; or

19           “(4) the Director approves retention of all or a  
20          portion of the records for a period necessary for (i) in-  
21          vestigative reference, (ii) training, or (iii) administrative  
22          purposes.

1 "SUBCHAPTER IV—UNDERCOVER OPERATIONS

2 "§ 534. Authorization of undercover operations

3 "(a) UNDERCOVER OPERATIONS GENERALLY.—The  
4 FBI is authorized to conduct undercover operations pursuant  
5 to guidelines established by the Attorney General when ap-  
6 propriate to carry out its responsibilities under section 533. If  
7 it is necessary to the successful conduct of undercover oper-  
8 ations, the FBI may—

9 "(1) procure or lease property, supplies, services,  
10 equipment, buildings or facilities, or construct or alter  
11 buildings or facilities or contract for construction or al-  
12 teration of buildings or facilities, in any State, includ-  
13 ing the District of Columbia, without regard to provi-  
14 sions relating to contract clauses, contract procedures,  
15 lease and alteration restrictions, or other provisions  
16 regulating procurement undertaken in the name of the  
17 United States;

18 "(2) establish, furnish, and maintain secure cover  
19 for FBI personnel or informants, by making false rep-  
20 resentations to third parties, and by concealing the  
21 Government involvement in the operation;

22 "(3) establish and operate proprietaries;

23 "(4) use proceeds generated by a proprietary or  
24 other undercover operation to offset necessary and rea-  
25 sonable expenses of that proprietary or other undereov-

1 er operation, if the balance of such proceeds is deposit-  
2 ed in the Treasury of the United States as miscella-  
3 neous receipts;

4 "(5) deposit appropriated funds and proceeds of an  
5 undercover operation in banks or other financial insti-  
6 tutions; and

7 "(6) engage the services of cooperative individuals  
8 or entities in aid of undercover operations, and reim-  
9 burse those individuals or entities for their services or  
10 losses incurred as a result of such operations, if any  
11 such assumption of liability for losses is specifically ap-  
12 proved by the Attorney General or the Deputy Attor-  
13 ney General before any representations are made relat-  
14 ing thereto, except in exigent circumstances.

15 "(b) PROPRIETARIES.—

16 "(1) The FBI may operate a proprietary estab-  
17 lished under this section on a commercial basis to the  
18 extent necessary to maintain its cover or effectiveness.

19 "(2) Whenever a proprietary with a net value  
20 over \$50,000 is to be liquidated, sold, or otherwise dis-  
21 posed of, the FBI, as much in advance as the Director  
22 or his designee shall determine is practicable, shall  
23 report the circumstances to the Attorney General and  
24 the Comptroller General. The proceeds of the liquida-  
25 tion, sale, or other disposition, after obligations are

1 met, shall be deposited in the Treasury of the United  
2 States as miscellaneous receipts.

3 “(c) CONTINUATION OF AUTHORITY.—The authority  
4 provided in subsection (a) or (b) may be exercised notwith-  
5 standing any contrary provision of law generally applicable to  
6 Federal Government agencies and shall not be modified, lim-  
7 ited, suspended, expanded or superseded by any provision en-  
8 acted after the effective date of this chapter unless the subse-  
9 quent provision expressly cites an intent to modify, limit,  
10 expand, or suspend this section.

11 “SUBCHAPTER V—CIVIL AND OTHER  
12 INVESTIGATIONS

13 “§ 535. Investigation of civil matters

14 “The FBI is authorized to conduct investigations of  
15 matters within the civil enforcement or litigation responsibil-  
16 ities of the Attorney General, including the responsibilities  
17 described in sections 514 through 520 of this title, upon re-  
18 quest of the Attorney General or his designee.

19 “§ 535a. Collection of information on civil disorders and  
20 public demonstrations requiring Federal as-  
21 sistance

22 “(a) AUTHORIZATION PURSUANT TO GUIDELINES.—  
23 The FBI is authorized, pursuant to guidelines issued by the  
24 Attorney General, to collect information and report to the  
25 Department of Justice—

1           “(1) concerning an actual or threatened civil dis-  
2           order that may require the presence of Federal troops  
3           or United States marshals to enforce Federal law or  
4           Federal court orders or that may result in a request for  
5           Federal assistance by State governmental authorities  
6           under section 331 of title 10, United States Code; or

7           “(2) relating to a peaceful public demonstration  
8           that is likely to require the Federal Government to  
9           take action to provide assistance to facilitate the dem-  
10          onstration or to provide public health and safety meas-  
11          ures with respect thereto.

12          “(b) APPROVAL OF ATTORNEY GENERAL.—No infor-  
13          mation described in paragraph (2) of subsection (a) shall be  
14          collected without the specific approval of the Attorney Gen-  
15          eral or his designee.

16          “(c) LIMITATIONS.—The FBI shall limit its collection  
17          of information under subsection (a) to information that will  
18          assist the Attorney General in determining whether the use  
19          of Federal troops or other Federal assistance is required.

20          “(d) ISSUANCE OF GUIDELINES.—The Attorney Gen-  
21          eral shall issue guidelines designed to insure that—

22                 “(1) investigative techniques used for collection of  
23                 information under subsection (a)(1) shall be limited in-  
24                 sofar as is practicable to collection of publicly available  
25                 information, and shall not include those techniques de-

1       scribed in subsections (d) through (g) of section 533b,  
2       except in exigent circumstances and with the approval  
3       of the Attorney General;

4               “(2) investigative techniques used for collection of  
5       information under subsection (a)(2) shall be limited in-  
6       sofar as is practicable to collection of publicly available  
7       information, but in no event shall include those tech-  
8       niques described in subsections (d) through (g) of sec-  
9       tion 533b, or the use of an informant or undercover  
10      Agent to infiltrate a group or the recruitment of a  
11      person within such group as an informant; and

12              “(3) information collected is stored in such a way  
13      as to minimize retrievability of information about an  
14      identifiable person unless that person is the subject of  
15      an ongoing lawful investigation authorized by this  
16      chapter at the time of collection.

17   **“§535b. Background investigations by Federal Bureau of**  
18               **Investigation of appointees, applicants, and**  
19               **employees**

20              “(a) WRITTEN REQUEST FOR APPOINTEES.—The  
21      FBI, upon written request of the President or a President-  
22      elect or an official designated in writing by the President or  
23      an individual designated in writing by a President-elect, is  
24      authorized to conduct an investigation of an individual who  
25      has consented to be considered for—

1           “(1) nomination to an office requiring the advice  
2           and consent of the Senate; or

3           “(2) appointment to a position in the Executive  
4           Office of the President that the requesting individual  
5           certifies will require access to classified information.

6           “(b) OTHER CIRCUMSTANCES FOR INVESTIGATIONS.—

7           The FBI may conduct an investigation of an individual who  
8           has—

9           “(1) consented to be considered for nomination by  
10          the President as a justice or judge;

11          “(2) applied for employment in the FBI or a posi-  
12          tion in the Department of Justice designated by the  
13          Attorney General or his designee as requiring such an  
14          investigation;

15          “(3) applied for a Presidential reprieve or pardon;  
16          or

17          “(4) been designated by the Attorney General as  
18          requiring access to classified information.

19          “(c) ACCESS TO CLASSIFIED INFORMATION.—Upon  
20          written request and if the individual consents to the investi-  
21          gation, and the official requesting the investigation certifies  
22          that the position is one requiring access to classified informa-  
23          tion, the FBI may conduct an investigation on a reimbursable  
24          basis, of an individual who has applied for or occupies a posi-  
25          tion on the staff of—

1           “(1) the Committee on Appropriations or the  
2       Committee on the Judiciary of the Senate or House of  
3       Representatives,

4           “(2) the Select Committee on Intelligence of the  
5       Senate,

6           “(3) the Permanent Select Committee on Intelli-  
7       gence of the House of Representatives,

8           “(4) the Speaker of the House of Representatives,

9           “(5) the President pro tempore of the Senate, or

10          “(6) the majority or minority leader of either  
11       House.

12       “(d) APPOINTMENTS IN UNITED STATES COURTS.—

13   Upon written request of the Director of the Administrative  
14   Office of the United States Courts or his designee, the FBI  
15   may conduct a background investigation, on a reimbursable  
16   basis, of an individual who has consented to be considered for  
17   appointment as a United States magistrate, bankruptcy  
18   judge, or special prosecutor considered for appointment pur-  
19   suant to the Ethics in Government Act of 1978.

20   “§ 535c. Federal Bureau of Investigation assistance in  
21               background inquiries by other Federal agen-  
22               cies

23       “The FBI is authorized to provide relevant information  
24   from its files, including fingerprint files, to a requesting Fed-

1 eral agency if the agency is authorized to make inquiry con-  
2 cerning or conduct a background investigation of—

3           “(1) an applicant for employment by or an em-  
4 ployee of—

5                   “(A) an agency; or

6                   “(B) a contractor or prospective contractor  
7 for an agency;

8           “(2) a contractor or prospective contractor for an  
9 agency;

10           “(3) a person who requires access to information  
11 classified in the interest of national defense or foreign  
12 relations of the United States;

13           “(4) an individual who has access to a person or  
14 premises within the protective responsibility of the  
15 United States Secret Service if the requesting agency  
16 is the United States Secret Service;

17           “(5) an applicant for a Federal grant or loan, to  
18 the extent authorized by the Attorney General or his  
19 designee; or

20           “(6) a person requiring access to a Federal com-  
21 puter system or data in that system who is subject to  
22 investigation and determination of clearance.

23 **“§535d. Special service functions**

24           “‘In addition to other duties and responsibilities defined  
25 in this chapter, the FBI may—

1           “(1) provide investigative assistance, including  
2           personnel and support staff, to those committees of the  
3           Congress for which it is authorized to conduct back-  
4           ground investigation of staff members, on a temporary  
5           and reimbursable basis, if the chairman of the commit-  
6           tee requests, and the Attorney General or his designee  
7           approves the provision;

8           “(2) provide investigative assistance and technical  
9           services to the Office of Professional Responsibility and  
10          other components of the Department of Justice, as au-  
11          thorized by the Attorney General or his designee, in  
12          connection with matters within the responsibilities con-  
13          ferred by law upon the Attorney General;

14          “(3) provide investigative assistance to a Federal  
15          grand jury on matters within FBI jurisdiction, upon re-  
16          quest of an attorney for the United States;

17          “(4) provide investigative assistance to other Fed-  
18          eral, State, or local law enforcement agencies in crimi-  
19          nal investigations when requested by the heads of such  
20          agencies if the Attorney General or his designee finds  
21          that such assistance is necessary and would serve a  
22          substantial Federal interest; and

23          “(5) provide protective services as authorized by  
24          the Attorney General or his designee in connection

1 with matters within the responsibilities conferred by  
2 law upon the Attorney General.

3 "SUBCHAPTER VI—LAW ENFORCEMENT

4 SUPPORT FUNCTIONS

5 "§ 536. Education, training, and research

6 "The FBI is authorized to—

7 "(1) establish, conduct, or assist in conducting  
8 programs to provide education and training for its em-  
9 ployees and for law enforcement and criminal justice  
10 personnel of other Federal agencies, State, or local  
11 agencies, and foreign governments and members of the  
12 Armed Forces of the United States; and

13 "(2) conduct or contract for research and develop-  
14 ment of new or improved approaches, techniques, sys-  
15 tems, equipment, and devices to improve and strengthen  
16 law enforcement and criminal justice and to procure  
17 such systems, equipment, necessary information and  
18 material, including technical systems and devices for its  
19 authorized law enforcement functions under sections  
20 533, 533b, 533c, 534, and 535e of this chapter.

21 "§ 536a. Foreign liaison

22 "The FBI is authorized to establish and maintain liaison  
23 with, and to provide mutual assistance to a foreign law en-  
24 forcement agency, consistent with the provisions of this chap-

1 ter and in accordance with guidelines established by the At-  
2 torney General by—

3           “(1) stationing FBI liaison personnel abroad, with  
4 the approval of the Attorney General and the Secre-  
5 tary of State;

6           “(2) directing an inquiry to a foreign law enforce-  
7 ment agency in connection with a criminal or back-  
8 ground investigation being conducted by the FBI or by  
9 another Federal agency that requests the FBI to make  
10 the inquiry and directing the response to the requesting  
11 agency;

12           “(3) directing an inquiry to a foreign law enforce-  
13 ment agency in connection with a criminal investiga-  
14 tion being conducted by a State or local law enforce-  
15 ment agency that requests the FBI to make the in-  
16 quiry and directing the response to the requesting  
17 agency;

18           “(4) making a preliminary inquiry or conducting  
19 an investigation within the United States, at the re-  
20 quest of a foreign law enforcement agency, to locate a  
21 fugitive or obtain information required in connection  
22 with a criminal investigation being conducted by the  
23 foreign agency and furnishing the results to the re-  
24 questing agency, except that the FBI may not conduct  
25 investigations of matters that would not be crimes if

1 occurring in the United States and may use sensitive  
2 techniques only as authorized by section 533b, and all  
3 such activities shall be approved by the Director or his  
4 designee;

5 “(5) exchanging criminal investigative, scientific,  
6 and technical information from its files with law en-  
7 forcement and security agencies of foreign governments  
8 that are conducting criminal investigations for which  
9 such information is requested; and

10 “(6) furnishing assistance in background investiga-  
11 tions at the request of a foreign law enforcement or se-  
12 curity agency, except that such assistance shall be un-  
13 dertaken only upon assurance of the requesting agency  
14 that the investigation is for official purposes relating to  
15 government employment, security clearance, licensing,  
16 visas or immigration and that the individual involved  
17 has consented to such investigation.

18 **“§536b. Technical assistance**

19 “The FBI is authorized to—

20 “(1) provide identification assistance for humani-  
21 tarian purposes, including disasters and missing person  
22 cases, at the request of another Federal agency or a  
23 foreign, State, or local governmental agency;

24 “(2) provide laboratory, identification, technical,  
25 and scientific assistance in connection with—

1           “(A) an investigation being conducted by a  
2           Federal agency that requests such assistance; and

3           “(B) a criminal investigation being conducted  
4           by a State or local law enforcement agency that  
5           requests such assistance;

6           “(3) provide expert testimony in Federal, State,  
7           local, or foreign proceedings in connection with assist-  
8           ance rendered pursuant to subsection (a) or (b);

9           “(4) provide technical examinations to detect clan-  
10          destine surveillance devices, upon request of a Federal  
11          agency, a committee of the Congress, or a court of the  
12          United States; and

13          “(5) provide scientific or technical analyses of ma-  
14          terials of historic significance upon request of a Feder-  
15          al, State, or local agency.

16   **“§ 536c. Cooperation with the Secret Service**

17          “Consistent with the provisions of this chapter, the FBI  
18   is authorized to provide personnel, informational, investiga-  
19   tive, and technical assistance to the United States Secret  
20   Service in connection with its protective responsibilities. The  
21   FBI may conduct investigations at the request of the Secret  
22   Service provided the requirements of section 533 are met.

1 "§ 536d. Identification, criminal history, and other rec-  
2 ords; exchange for criminal justice purposes

3 "(a) CIVIL AND CRIMINAL RECORDS.—The FBI is au-  
4 thorized to acquire, collect, classify, and preserve—

5 "(1) civil fingerprint records, including those vol-  
6 untarily submitted to it;

7 "(2) criminal fingerprint records and criminal his-  
8 tory information;

9 "(3) records concerning fugitives for whom arrest  
10 warrants are outstanding;

11 "(4) records relating to stolen property;

12 "(5) records and related information concerning  
13 missing persons;

14 "(6) other records relating to crime, including sta-  
15 tistics, to the extent authorized by the Attorney Gener-  
16 al or his designee.

17 "(b) EXCHANGE OF RECORDS.—The FBI is authorized  
18 to exchange information described in subsection (a) with—

19 "(1) a criminal justice agency of the Federal Gov-  
20 ernment;

21 "(2) a foreign law enforcement or security agency;

22 "(3) a State or local criminal justice agency;

23 "(4) a law enforcement organization authorized by  
24 State statute to investigate crimes or apprehend crimi-  
25 nals on interstate common carriers; and

1           “(5) a State or local law enforcement or criminal  
2       justice agency in connection with the employment of  
3       law enforcement or criminal justice personnel.

4   “§536e. Identification, criminal history, and other rec-  
5           ords; exchange for employment or licensing  
6           purposes

7       “(a) EXCHANGE OF CERTAIN CRIMINAL RECORDS.—  
8   Except as provided in subsection (b), the FBI is authorized to  
9   exchange criminal fingerprint records and criminal history in-  
10  formation with—

11           “(1) a Federal agency that has responsibility for  
12       the licensing or registration of individuals or business-  
13       es, or for the administration of visa, immigration, or  
14       passport laws;

15           “(2) a federally chartered or insured financial in-  
16       stitution;

17           “(3) an organization that is required by section  
18       17(f) of the Securities Exchange Act of 1934 (15  
19       U.S.C. 78q(f)), to exchange such records;

20           “(4) a State or local agency authorized by State  
21       statute to obtain such information for employment or  
22       licensing purposes, if the Attorney General or his des-  
23       ignee has approved exchange under the statute; and

24           “(5) a foreign government for the administration  
25       of visa, immigration, and passport laws.

1       “(b) **TIME LIMITATION.**—The FBI may not furnish  
2 arrest data more than one year old under this section or sec-  
3 tion 535c unless it is accompanied by disposition data.

4       **“§ 536f. Retention of unsolicited information**

5       “Unsolicited information about an identifiable person  
6 that does not pertain to any of the functions or responsibil-  
7 ities of the FBI, as defined by law, may be retained only for  
8 the limited period necessary for administrative processing, as  
9 authorized by guidelines issued by the Attorney General.

10       **“SUBCHAPTER VII—MISCELLANEOUS**

11       **“§ 537. Civil fines and penalties**

12       “(a) **VIOLATIONS OF CHARTER.**—In addition to any  
13 disciplinary action authorized by law, the Director may  
14 impose a civil penalty up to \$5,000 on any person who, while  
15 acting as an employee of the FBI, intentionally uses any of  
16 the sensitive investigative techniques described in section  
17 533b knowing that such use violates the provisions of this  
18 chapter. The penalty shall be in addition to any other penalty  
19 which may be prescribed by statute or regulation and shall be  
20 imposed in a manner consistent with the provisions of the  
21 Civil Service Reform Act of 1978. Recovery of a civil penal-  
22 ty against a former employee for a violation that occurred  
23 during the period of employment shall be made pursuant to  
24 the provisions of chapter 163 of this title.

1       “(b) IMPROPER DISSEMINATION OF RECORDS.—The  
2 FBI may modify, suspend, or cancel the exchange of crime  
3 record information if the Federal, foreign, State or local  
4 agency or private organization receiving such information  
5 disseminates it outside the receiving agency or organization  
6 or a related agency or organization in violation of guidelines  
7 established by the Attorney General.

8       “§ 537a. Civil remedies; nonlitigability of guidelines and  
9                               procedures

10       “(a) NO CIVIL CAUSE OF ACTION AGAINST UNITED  
11 STATES.—Nothing in this chapter creates a civil cause of  
12 action against the United States not available under other  
13 provisions of this title, or a civil cause of action against any  
14 officer, agent, or employee or former officer, agent, or em-  
15 ployee of the United States Government not otherwise avail-  
16 able at law.

17       “(b) EFFECT OF FAILURE TO FOLLOW THIS CHAP-  
18 TER, GUIDELINES, OR PROCEDURES.—Nothing in this chap-  
19 ter, or in any guidelines or procedures established pursuant  
20 to this chapter, creates any substantive or procedural right  
21 and no court has jurisdiction over a claim in any proceeding,  
22 including a motion to quash a subpoena, suppress evidence,  
23 or dismiss an indictment, based solely on an alleged failure to  
24 follow a provision of this chapter or of guidelines or proce-  
25 dures established pursuant to this chapter.

1   **"§ 537b. Protection of the investigative process**

2       “(a) PUBLIC DISCLOSURE OF GUIDELINES.—Any  
3 guidelines promulgated by the Attorney General as required  
4 by this chapter shall be made available to the public unless  
5 the Attorney General determines that a particular guideline  
6 or portion thereof cannot be made public without assisting a  
7 criminal to avoid detection, compromising investigations or  
8 investigative techniques, or otherwise jeopardizing the inves-  
9 tigative process, in which case the guideline or portion there-  
10 of shall not be made public and shall be considered an investi-  
11 gatory record for the purposes of section 552(b) of title 5,  
12 United States Code.

13       “(b) PUBLIC DISCLOSURE OF PROCEDURES.—Any  
14 procedure established by the Director to implement the re-  
15 quirements of this chapter, not otherwise exempt under sec-  
16 tion 552(b) of that title, are exempt from public disclosure if  
17 the Director determines that the public knowledge of such  
18 procedures or any portion thereof would assist a criminal to  
19 avoid detection or would compromise sensitive investigative  
20 techniques.

21   **"§ 537c. Congressional oversight and accountability of the**  
22       **Federal Bureau of Investigation**

23       “(a) DUTIES OF THE ATTORNEY GENERAL.—To the  
24 extent not inconsistent with all applicable authorities and  
25 duties, including those conferred by the Constitution and

1 laws of the United States upon the executive and legislative  
2 branches, the Attorney General shall—

3           “(1) keep the Committees on the Judiciary of the  
4 Senate and the House of Representatives fully and  
5 currently informed concerning the implementation of  
6 this chapter; and

7           “(2) provide any information or material of the  
8 FBI within the jurisdiction of the Committees on the  
9 Judiciary of the Senate and the House of Representa-  
10 tives, in accordance with provisions agreed to by the  
11 respective chairmen of those committees and the  
12 Attorney General.

13           “(b) DUTIES OF THE DIRECTOR.—On an annual basis,  
14 the Director shall provide the following information to Com-  
15 mittees on the Judiciary of the Senate and the House of  
16 Representatives:

17           “(1) The total number of investigations, specified  
18 by category, conducted in the preceding calendar year.

19           “(2) The total number of activities, specified by  
20 category, conducted in the preceding calendar year  
21 which under this chapter, require approval of the Di-  
22 rector or his designee or the Attorney General or his  
23 designee.

1           “(3) Any other report required by the Committee  
2           on the Judiciary of the Senate or the House of Repre-  
3           sentatives within its oversight functions.

4           “(c) CONGRESSIONAL REVIEW OF GUIDELINES; NON-  
5 DISCLOSURE OF GUIDELINES.—As soon as feasible after the  
6 effective date of this chapter, the Attorney General shall  
7 submit to the Committees on the Judiciary of the Senate and  
8 the House of Representatives for their review and comment  
9 any guidelines established pursuant to section 533a, 533b,  
10 533c, 534, 535a, 535b, 536a, or 536f of this chapter and the  
11 reasons any portions thereof should not be publicly disclosed  
12 under section 537b.

13   **“§ 537d. Periodic review of guidelines**

14           “At such intervals as the Attorney General may pre-  
15 scribe, the Director shall conduct a periodic review and anal-  
16 ysis of the application of all guidelines issued pursuant to this  
17 chapter to insure that such guidelines are complied with and  
18 effectively achieve the purposes for which they were  
19 issued.”.

20           SEC. 3. Title 5 of the United States Code is amended as  
21 follows:

22           (a) Section 1304 is amended—

23                   (1) by repealing subsections (b), (c), and (d); and

24                   (2) in subsection (f) by striking out “or the Feder-  
25           al Bureau of Investigation” each time it appears.

1 (b) Section 2102(a)(1) is amended by adding at the end  
2 thereof the following:

3 "(D) positions in the Federal Bureau of In-  
4 vestigation."

5 (c) Section 5313 is amended by adding at the end there-  
6 of the following new paragraph:

7 "( ) Director of the FBI, Department of Jus-  
8 tice."

9 (d) Section 5314 is amended by repealing paragraph  
10 (44).

11 SEC. 4. Chapter 203 of title 18, United States Code, is  
12 amended—

13 (1) by repealing section 3052; and

14 (2) by amending the item relating to section 3052  
15 in the table of sections at the beginning of the chapter  
16 to read:

"3052. Repealed."

17 SEC. 5. Section 22 of the Peace Corps Act (22 U.S.C.  
18 2519) is amended by striking out the second and third  
19 sentences.

20 SEC. 6. Section 45 of the Arms Control and Disarma-  
21 ment Act (22 U.S.C. 2585) is amended by—

22 (1) striking out the third sentence in subsection  
23 (a); and

1           (2) striking out "or the Federal Bureau of Investi-  
2           gation" in subsection (b).

3           SEC. 7. Chapter 31 of title 28, United States Code, is  
4 amended—

5           (1) by adding after section 513 the following new  
6           section:

7   **"§ 513a. Investigative authority**

8           **"(a) PROTECTION OF CONFIDENTIALITY.**—The Attor-  
9   ney General may conduct investigations regarding official  
10 matters under the control of the Department of Justice. He  
11 shall be responsible for protecting the integrity of investiga-  
12 tive files and the confidentiality of informants, undercover op-  
13 erations, and other sensitive investigative techniques. In no  
14 event may a court order an attorney for the Government or  
15 any other official of the Department of Justice to disclose the  
16 identity of a confidential informant or information which  
17 would reveal such identity, except to the court in camera, if  
18 the Attorney General has made a determination that the in-  
19 formant's identity must be protected. However, the court  
20 may issue any other order in response to such a determina-  
21 tion by the Attorney General.

22           **"(b) INVESTIGATION OF FEDERAL EMPLOYEES.**—The  
23 Attorney General and the FBI may investigate any violation  
24 of title 18, United States Code, and other provisions of Fed-

1 eral criminal law, except violations of title 26, United States  
2 Code, involving a Government officer or employee—

3           “(1) notwithstanding any other provisions of law;  
4       and

5           “(2) without limiting the authority to investigate  
6       any matter which is conferred on them or on a depart-  
7       ment or agency of the Government.

8       “(c) LIMITATIONS ON INVESTIGATION OF FEDERAL  
9 EMPLOYEES.—Any information, allegation, or complaint re-  
10 ceived in a department or agency in the executive branch of  
11 the Government relating to a violation of a criminal law of  
12 the United States involving a Government officer or em-  
13 ployee shall be expeditiously reported to the Attorney Gen-  
14 eral by the head of the department or agency, unless—

15           “(1) the responsibility to perform an investigation  
16       with respect thereto is specifically assigned otherwise  
17       by another provision of law; or

18           “(2) as to any department or agency of the Gov-  
19 ernment, the Attorney General directs otherwise with  
20 respect to a specific class of information, allegation, or  
21 complaint.

22       “(d) EFFECT ON OTHER INVESTIGATIVE AUTHOR-  
23 ITY.—Subsections (b) and (c) do not limit—

24           “(1) the authority of the military departments to  
25       investigate persons or offenses over which the armed

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1 forces have jurisdiction under the Uniform Code of  
2 Military Justice (chapter 47 of title 10); or

3 "(2) the primary authority of the Postmaster Gen-  
4 eral to investigate postal offenses.";

5 (2) by adding after the item relating to section  
6 513 in the table of sections at the beginning of the  
7 chapter the following new item:

"513a. Investigative authority.";

8 (3) by adding at the end of the chapter the follow-  
9 ing new section:

10 **"§528. Attorney General responsibility for FBI investiga-**  
11 **tions**

12 "It is the duty of the Attorney General to take all rea-  
13 sonable steps to insure that every investigation authorized by  
14 chapter 33 of this title is conducted in conformity with the  
15 Constitution, chapter 33, and other laws of the United  
16 States, and does not abridge any right protected by the Con-  
17 stitution or laws of the United States."; and

18 (4) by adding after the item relating to section  
19 527 in the table of sections at the beginning of the  
20 chapter the following new item:

"528. Attorney General responsibility for FBI investigations.".

21 **SEC. 8. Section 145 of the Atomic Energy Act of 1954**  
22 **(42 U.S.C. 2165) is amended by striking out subsections (d),**  
23 **(e), and (f).**

1        SEC. 9. Section 304(a) of the National Aeronautics and  
2 Space Act of 1958 (42 U.S.C. 2455(a)) is amended by strik-  
3 ing out “; and if any such investigation develops any data  
4 reflecting that the individual who is the subject thereof is of  
5 questionable loyalty the matter shall be referred to the FBI  
6 for the conduct of a full field investigation, the results of  
7 which shall be furnished to the Administrator.”.

8        SEC. 10. The Omnibus Crime Control and Safe Streets  
9 Act of 1968 (42 U.S.C. 3701 et seq.), is amended as follows:

10            (a) Section 402(b)(6) (42 U.S.C. 3742(b)(6)) is  
11        amended by striking out “404 of this Act” and insert-  
12        ing in lieu thereof “535d of title 28, United States  
13        Code”.

14            (b) Section 404 (42 U.S.C. 3744) is repealed.

15            (c) Section 1101(b) (28 U.S.C. 532 note) is re-  
16        pealed.

17        SEC. 11. Section 403(a) of the Federal Civil Defense  
18 Act of 1950 (50 U.S.C. App. 2255(a)) is amended—

19            (a) by striking out in the second sentence “the  
20        Federal Bureau of Investigation shall have conducted a  
21        full field investigation concerning such person and”;  
22        and

23            (b) by striking out the last two sentences.

24        SEC. 12. The provisions of this Act take effect ninety  
25 days after the date of its enactment.

## APPENDIX 2

## THE FEDERAL BUREAU OF INVESTIGATION CHARTER ACT

## SECTION-BY-SECTION COMMENTARY

Section 1 of the bill establishes the title for the legislation.

Section 2 establishes a new Chapter 33 in Title 28 which will consist of the FBI Charter. The description of the charter which follows uses the new numbering system as it would appear in Title 28.

Section 531 defines the scope of the charter itself and states the purposes for its enactment. The charter defines in statutory form the myriad functions the FBI performs, other than those functions relating to foreign intelligence collection and foreign counterintelligence investigations. It is contemplated that there will be a separate charter relating to the FBI's performance of these functions. The purpose of the charter is not only to define the FBI's mission, but to codify and confer the authority necessary to carry out that mission and to establish conditions, limitations and restrictions for the discharge of the FBI's duties and responsibilities.

Section 531a adopts as a fundamental principle that the charter is the exclusive statement of the authority, duty and responsibility of the FBI. Section 531a also states certain fundamental investigative principles. These principles govern all of the provisions of the charter dealing with particular types of investigations, including preliminary investigations (referred to in the charter as "inquiries"). FBI investigations should involve minimal intrusion into the lives of individuals under investigations, and as Attorney General Stone emphasized, should be concentrated on criminal conduct proscribed by law when the premise for investigation is the FBI's responsibility to detect crime. Underscoring this concept, section 531a states unequivocally that the lawful exercise of the right to dissent or other exercise of constitutional rights cannot justify an investigation where no criminal conduct is involved.

Certain key terms used in the charter are defined in section 531b. The terms "aggravated property destruction," "destructive device," "pattern of terrorist activity" and "terrorist activity" all relate to the provisions of section 533(b)(3)

concerning the FBI's responsibility to investigate terrorism. "Terrorist activity" is that which is designed to intimidate or coerce through the use of criminal violence. Two or more such violent acts which share the same participants, methods, victims or otherwise appear interrelated, and which are designed to influence government policy by intimidation, constitute "a pattern of terrorist activity."

The term "enterprise", which is used in connection with the authorization for terrorism investigations and organized crime investigations, is defined to include group activity, whether by a formal organization or by a loosely structured group. The term is derived from the "Racketeer Influenced and Corrupt Organizations" (RICO) Statute, (18 U.S.C. §1961-68) which also provides the precedent for grounding federal jurisdiction on a "pattern of activity" in violation of state law.

The terms "guidelines" and "procedures" used throughout the charter are defined. "Guidelines" refers to written statements of policy issued by the Attorney General to govern the investigative activities of the FBI. "Procedures" are the internal rules and regulations, and the manuals established by the FBI concerning investigations and administrative matters.

"Informant" is defined as any person who furnished information to the FBI on a confidential basis, whether on a single occasion or on a continuing basis. This broad definition is used here to avoid a basis for claiming in litigation that the informant privilege is in any way limited to persons who have a continuing relationship with the FBI. Where provisions in the charter are limited to a particular type of informant, the limitations are described explicitly in the relevant section.

"Racketeering activity" is defined by reference to the provisions of the Racketeer Influence and Corrupt Organizations (RICO) Act to include a pattern of violations of specified state criminal statutes.

Section 532 restates the provision in the present 28 U.S.C. 531, establishing the FBI in the Department of Justice, and codifies the provisions of 28 C.F.R. 0.85 that the FBI is under the policy supervision of the Attorney General and, insofar as the Attorney General directs, the Deputy Attorney General.

Section 532a incorporates the provision in present 28 U.S.C. 532 placing a Director at the head of the FBI. It recognizes his responsibility to report to the Attorney General and, if the Attorney General directs, to the Deputy Attorney General. It also incorporates the provision of Public Law 90-351 providing

for Presidential appointment of the Director, with the advice and consent of the Senate, for one ten year term.

The general duties and responsibilities of the Director are described in Section 532b. These include insuring that the activities of the FBI comport with the Constitution and laws of the United States and with the charter and related guidelines, and establishing any procedures necessary to carry out the charter. The Director is also charged with responsibility to establish an "effective" disciplinary system to enforce the charter and to insure the effective administration of the law enforcement responsibilities of the FBI.

Subsection (a) of section 532c restates the power to carry firearms, make arrests, serve warrants, and pay rewards now contained in 18 U.S.C. 3052 and 3059. Subsection (b) restates the authority now contained in 28 U.S.C. 537 to expend funds on a confidential basis for unforeseen emergencies, on the certification of the Attorney General.

Subchapter III of the new Chapter 33, Title 28, is the basic authorization for the FBI to conduct criminal investigations. The term "investigation" is used throughout subchapter III, except in subsection 533, to include "inquiries". Subchapter III also places restrictions on the use of certain techniques in the conduct of such investigations.

Section 533, containing the basic investigative authority, begins with an elaboration of the authority as now stated in 28 U.S.C. 533(1). It recognizes that the FBI is the primary criminal investigative agency of the federal government and has the authority to investigate all criminal violations of federal law not assigned exclusively to another federal agency. However, previously established arrangements concerning dual or non-exclusive jurisdiction are not altered by this charter.

The subsection also recognizes that there is a distinction between "inquiries" conducted to determine whether a full scale investigation is warranted and the actual conduct of "investigations" by the FBI. The authority to conduct inquiries short of a full investigation allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit. This is especially important in such areas as white-collar crime where no complainant is involved or when an allegation or information is received from a source of unknown reliability. It is contemplated

that such inquiries would be short duration and be confined solely to that information which is necessary to make an informed judgment as to whether a full investigation is warranted. The techniques available for preliminary inquiries are generally less intrusive than those employed in the full investigation. In no event would they include wiretapping, mail openings, mail covers or investigative demands. In addition, infiltration of groups by new sources or by undercover Agents is not permitted in an inquiry conducted pursuant to subsection 533(b)(3). Certain other intrusive techniques may be used only in compelling circumstances and when other investigative means are not likely to be successful. The use of such techniques during a limited inquiry will be carefully regulated by guidelines and internal regulations requiring approval by designed officials of the FBI.

The subsection provides that the purpose of FBI investigations is to detect either the existence of crime or the identity of a criminal, prevent further crimes by notifying prosecutive authorities, arresting the individual involved, or detecting a conspiracy before it achieves its final objective, and gather evidence for prosecution.

The remainder of section 533 defines with greater precision the basis on which the FBI may investigate specific criminal violations or criminal enterprises engaged in organized crime or terrorism activities. In each instance, investigation must be based on "facts or circumstances" that "reasonably indicate" the existence of the criminal conduct described.

Subsection (b)(1) authorizes investigation of federal criminal violations when facts or circumstances reasonably indicate that a person has engaged, is engaged or will engage in the activity proscribed. The word "will" is used not only to encompass the investigation of future crimes, but suggests that a greater likelihood of criminal activity is necessary to support such investigation. There must be an objective, factual basis for initiating the investigation; mere hunch is insufficient. The investigation is conducted to gather information necessary for a prosecutor to determine whether there is probable cause to take to a grand jury or use as the basis for filing an information.

The focus of the investigation may be either on the question whether behavior which is clearly occurring is, in fact, criminal or on identifying the perpetrator of a crime known to have occurred. It would not be necessary to focus at the outset on an identified individual. The reference to "a person" includes an individual whose identity is yet to be determined. An investigation may be initiated on the basis of an allegation, which has been checked through the initial inquiries described above, or a combination of circumstances, such as repeated complaints that a government warehouse is in short supply of items listed on an inventory, which lead to the reasonable inference that property is being diverted unlawfully.

Subsections (b)(2) and (3) authorize investigations of criminal enterprises engaged in racketeering and terrorist activities. The concept is drawn from the "Racketeer Influenced and Corrupt Organizations" (RICO) Statute (18 U.S.C. §1961-68) which authorizes criminal prosecution of certain enterprises as a means of strengthening the government's enforcement powers against white collar and organized crime. These investigations differ from ordinary criminal investigations, authorized by subsection (b)(1), in several important respects. As a practical matter, an investigation of a completed criminal act is normally confined to determining who committed that act and with securing evidence to establish the elements of the particular crime. It is, in this respect, self-defining. An investigation of an ongoing criminal enterprise must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation terminates with the decision to prosecute or not to prosecute, the investigation of a criminal enterprise does not necessarily end, even though one or more of the participants may have been prosecuted.

In addition, the organization provides life and continuity of operation that are not normally found in regular criminal activity. As a consequence, these investigations may continue for several years. In addition, as Justice Powell noted, the focus of such investigations "may be less precise than that directed against more conventional types of crime." United States v. United States District Court, 407 U.S. 297, 322 (1972). Unlike the usual criminal case, there may be no completed offense

to provide a framework for the investigation. It often requires the fitting together of bits and pieces of information, many meaningless by themselves, to ascertain if there is a mosaic of criminal activity. For this reason, the investigation is broader and less discriminate than usual, involving "the interrelation of various sources and types of information." Ibid.

At the same time, it is recognized that group investigations present special problems, particularly where they deal with politically motivated acts. As Justice Powell pointed out, "There is often a convergence of First and Fourth Amendment values not found in cases of 'ordinary' crime." Ibid. Thus, special care must be exercised in sorting out protected activities from those which may lead to violence or serious disruption of society. As a consequence, the charter establishes special safeguards for group investigations of special sensitivity, including tighter management controls and higher levels of review.

Subsection (b)(2) focuses on investigations of organized crime. It is concerned with investigation of entire enterprises or groups, rather than individual participants in specific criminal acts, and authorizes investigations to determine the structure and scope of an organized crime group as well as the relationship of the members. Again, the investigation must be based on facts or circumstances that reasonably indicate the existence of such a group engaged in racketeering activities.

Similarly, subsection (b)(3) contains a separate authorization for terrorism investigations which are also concerned with the activities of groups. Again these investigations must be based on facts or circumstances which reasonably indicate that there is an enterprise, that the purpose of that enterprise is terrorism, and that the terrorism goal is to be achieved by violent criminal activity. The enterprise must exist. The activity often will have already occurred and may be attributable to a particular organization, as where a group claims credit for a series of bombings or kidnappings. There may be instances, however, in which no terrorist act has occurred, thus raising the delicate issue of whether the group is engaged in lawful First Amendment activity or unlawful terrorism. That issue is present whenever the government tries to anticipate future criminal conduct, but it is more acute when the enterprise has not previously engaged in terrorist crimes. Obviously, a prior record of violence is an important factor in determining whether an investigation for future crimes is warranted. But the government may also look to other factors such as informant information, the stockpiling of weapons, an announced intent to engage in violence, and the full range of considerations that historically have been available to law enforcement officers.

The problem comes in knowing how far in advance of crime that government may properly initiate its inquiry. If the investigation begins prematurely, it may deal with marginal or speculative threats to society or with entirely innocent conduct. If commenced too late, it becomes difficult if not impossible to gather information that is needed for the government to respond effectively. It has been suggested that investigations dealing with future crimes should not be initiated without some showing that the persons are "planning or preparing" to engage in terrorist activities. The precise meaning of those terms is unclear but they suggest that the individuals involved must have devised a scheme or are "making ready" to commit a specific terrorist act. That delays the investigation to a point that is dangerously close to the commission of the crime. In addition, it is not clear how the government would acquire that information without prior investigation, unless it is intended that a preliminary inquiry would serve that purpose. In current practice those inquiries are very limited and not likely to produce the kind of information needed to satisfy that standard. The better approach is to recognize that the government must proceed with the utmost caution in such cases and perhaps to require a stronger factual basis for investigation if the enterprise has not previously engaged in terrorist crimes. It is intended that guidelines or internal procedures will be adopted that will attempt, to the extent possible, to limit those investigations to situations which reasonably indicate that there is a serious intent to engage in terrorist activities; mere abstract advocacy would not be a basis for investigation. Evidence of "planning and preparing," of course, is one way that requirement can be satisfied, but it should not be the sole basis on which such an investigation can be initiated.

The terrorist activity might involve either a direct violation of federal criminal law, such as kidnaping a foreign official or violating the federal explosives statute, or a pattern of terrorist activity in violation of State law, such as assassination of governors. See, e.g., 18 U.S.C. §1961 (5). The bill would also authorize investigation where the terrorist activity is multi-national, or is being planned in the United States for "export" to other countries. Precedent for this authority is found in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 (c) (3), which permits electronic surveillance of certain groups whose terrorist activities transcend national boundaries. Thus, if a group with substantial U. S. membership were planning to

engage in a series of bombings in Canada, the FBI would be permitted to investigate even though the terrorist activity occurs abroad. The subsection describes the type of activity to be investigated in terms of acts designed to intimidate or coerce segments of the civil population (e.g., the random bombing of restaurants), influence or retaliate against government (e.g., assassination of a federal official to protest the conviction of a fellow terrorist), or influencing or retaliating against the trade or economic policies of a company engaged in international commerce (e.g., kidnaping key officials of one of the multinational corporations because of its trade with a particular country).

The authority here is concerned with the investigation of a continuing enterprise that is terrorist in nature, not with the single act of an individual. Like organized crime investigations, these investigations may be of long duration and will be concerned with the relationship of the group members and the connection between individual criminal acts. However, the investigation must be confined to members of the criminal enterprise, particularly when such enterprise is a subgroup of a larger organization that engages in lawful political activities. The enterprise may involve either a pattern of specific criminal acts or a conspiracy to commit a single criminal act such as detonation of a nuclear device. The focus of the investigation, however, must be criminal activity of a terrorist type. As a further safeguard, the decision to investigate will take into account such factors as the likelihood, immediacy and magnitude of the threatened harm.

Section 533a requires the Attorney General to establish guidelines for the conduct of the criminal investigations described in the preceding section. It also sets three criteria to be met by these guidelines: (1) investigations must focus on criminal activity; (2) there must be an objective factual basis for investigation; and (3) the breadth of the investigation and the manner in which it is conducted must be dependent on the nature and the quality of the information available. This latter requirement essentially embodies the traditional concept that the lengths to which an investigator can go in trying to solve a crime will depend, in large part, on the certainty of the information he already has. In Miranda v. Arizona, 384 U.S. 436, 477-78, the Court suggested that an individual's mere presence at the scene of a crime might justify asking him to identify himself, even though there is no particular basis to suspect him. To pat-down an individual, however, Terry v. Ohio, requires specific and articulable facts giving reason

to believe he is engaged in criminal activity. The Fourth Amendment demands probable cause if an individual is to be arrested or searched. Similarly, the guidelines are expected to condition more intrusive investigative techniques on a stronger fact basis than is necessary to open the investigation initially.

Section 533a also contains special provisions for the periodic review of terrorist investigations. The Department of Justice must be advised of all such investigations and each that continues beyond one year must be reviewed by the Director. A report of such review must then be submitted to the Attorney General or an official the Attorney General designates. These special review provisions are included for terrorist investigations because they deal with groups who have, or allege, a political motive for their criminal activity and because the criminal activities may be coupled with political expression which is protected by the First Amendment.

Section 533b(a) contains special limitations on the use of sensitive investigative techniques. It requires that the Attorney General issue guidelines on the use of such techniques, either as separate documents or as part of the guidelines relating to particular types of investigations. The guidelines have a three-fold purpose: (1) to ensure that intrusion into the privacy of persons is not greater than necessary to conduct the investigation in a timely and effective manner; (2) to require formalized and higher levels of review and authorization as the use of specific techniques increases the likelihood of intrusion into privacy; and (3) to insure that information obtained by the techniques is used only for lawful governmental purposes. The techniques encompassed within this section are: informants, undercover agents and operations, physical surveillance, mail surveillance, electronic surveillance, access to third party records, access to tax returns and return information, trash covers, pen registers, consensual monitoring, electronic locations detectors, covert photographic surveillance and pretext interviews. Some of these are, of course, already subject to statutory limitations which are cross-referenced in the charter.

Subsection (b) recognizes that the use of informants and undercover Agents by the FBI is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, the technique of using informants to assist in the investigation of criminal activity, since it may involve an element of deception and intrusion into the privacy of individuals or may require government cooperation with persons whose reliability and motivation may

be open to question, should be carefully limited. Thus, while it is proper for the FBI to use informants in appropriate investigations, it is imperative that special care be taken to ensure that individual's rights are not infringed and that the government itself does not become a violator of the law.

Where an informant is used on a continuing basis by the FBI, given specific assignments to collect information, and targeted against an identifiable person, special restrictions are included. These restrictions recognize a distinction between a source or informant who provides information on a single occasion or who provides generalized information over a period of time, and the informant who, in a sense, works for the FBI in carrying out specific assignments to obtain information. While the latter is not an agent or employee of the FBI in a legal sense, the FBI bears a greater responsibility for the individual's conduct than is true of the occasional source of information. Thus, this section requires that a supervisory official of the FBI make a specific determination that the informant is suitable for use and that he is likely to provide information relating to an authorized investigation. The determination must be in writing and reviewed periodically by the Director of the FBI or his designee.

When an informant is given this type of assignment to collect information for the FBI on a continuing basis he must also be advised that he is not considered an Agent or employee in the normal sense and that the FBI cannot and will not protect him from arrest or prosecution for any criminal conduct he engages in. He must also be advised that the FBI will not condone his involvement in criminal activity unless his participation in criminal activity is itself found justified by an official of the FBI or of the Department of Justice. Determinations that participation in crime is justified must be reviewed annually by the Director or his designee. He is also to be warned against participation in violent acts, serving as an agent provocateur to instigate crime, or using illegal techniques, such as burglary, wire-tapping or mail opening, to acquire information for the FBI.

The provision recognizes that some of the most effective informants are themselves criminals and that their usefulness to the FBI frequently arises because they are engaged in

criminal activities giving them access to the individuals who are the targets of the investigation. A bookmaker may be recruited to provide information on organized crime figures controlling gambling in the locality, or a "fence" may be asked to supply information on those engaged in the interstate theft of stolen property. It would be unrealistic to expect that these informants would discontinue their illegal activity. Indeed, if they did, it is unlikely they would be in a position to gain the necessary information to aid the investigation. Similarly, an informant may be solicited to pay a bribe or invited to join in a cargo theft. Unless he goes along with this criminal activity, he will be unable to obtain the needed evidence for the FBI. Accordingly, the section provides for the FBI or the prosecutor to make a determination that it is appropriate to recruit an individual engaged in a continuing pattern of criminal activity or to approve an informant's participation in a particular criminal act. The determination, however, must weigh the prosecutive need for the information and the seriousness of the offense under investigation against the seriousness of the criminal activity in which the informant is involved. For example, use of a bookmaker to obtain evidence against a major organized crime figure may well be warranted where use of the same individual to obtain evidence on another minor bookmaker may not. Payment of a bribe to a corrupt official in order to expose him can be justified, where informant participation in a murder to obtain information on a thief is not.

Subsection 533b(b)(3) also places special limitations on the use of a licensed physician, a lawyer, a clergyman, or a member of the news media as an informant. There presently is no legal prohibition against using such persons as informants. Because of the obvious policy considerations, however, there have been relatively few instances in which the FBI has used persons in those professions to provide information on a continuing basis. This subsection establishes safeguards by requiring that such use be expressly authorized in writing by the Director or a designated senior official of the FBI, and that the Attorney General or his designee be promptly notified. In addition, the FBI is required to advise each person that he is not being requested to breach any legal obligation of confidentiality.

The FBI would be required to obtain some information about individuals it proposes to use as informants on a continuing basis or those who provide operational assistance in areas such

as undercover work in order to satisfy itself that the individual involved is suitable for use in this manner. The broad term "suitability" is used (rather than "reliability") to provide flexibility in assessing the use of informants. In some cases it may be extremely important to assess the reliability of an individual in advance; in other cases reliability is less important than the individual's relationship with the target of the investigation. The use of the individual must be decided in the context of the case under investigation or the service he is expected to provide. The inquiries would not be full scale investigations and would not involve such intrusive techniques as mail covers, electronic surveillance or review of tax records. Moreover, any information collected about the individual without his consent would not be retained if the decision is made not to use him as an informant or in some other capacity, unless he is a potential witness and retention of the information is necessary to satisfy Jencks or Brady requirements.

Section 533b(b) also deals with the use of undercover agents by the FBI. It specifies that FBI personnel may be used in undercover assignments only in connection with criminal investigations and that they remain bound by the strictures that apply to law enforcement officers acting in an overt capacity. Thus, the law of entrapment and search and seizure, as defined by Congress and the courts, continues to apply to these agents. In carry out assignments, undercover agents are not to engage in activities which are criminal under normal circumstances except to the extent necessary to obtain information or evidence necessary for prosecutive purposes, to maintain their cover and credibility, or to prevent serious bodily harm. This provision recognizes that an undercover agent may have to participate in the receipt of stolen property, bribery of corrupt officials or similar conduct proscribed by law, as a part of his undercover assignment. At the same time, involvement in such activities is justified only where it serves a paramount prosecutive purpose, or is necessary to establish or maintain cover or to prevent death or bodily injury. In addition, a written report must be made to an appropriate official of the FBI and specific approval obtained when the agent participates in a serious criminal act that was not contemplated or authorized at the time the operation was approved. Approval may be delayed in exigent circumstances, but a prompt report must be submitted as soon as the situation allows. The work of undercover agents, will of course, be subject to guidelines established by the Attorney General under section 533(a).

When either an informant or undercover agent is infiltrated into a terrorist group, or an informant is recruited from its ranks, a senior official of the FBI designated by the Director is

required to make a written finding that the infiltration meets the requirements of the charter and guidelines and is otherwise necessary. This finding is in addition to the basic determination of the suitability of an informant. Since infiltration of groups whose motivation may be political raises unique First Amendment considerations, it is appropriate that this section requires higher level approval and by a higher standard than other informants. As a further safeguard, this provision requires the adoption of special written procedures to assure that the undercover agent or the informant limits his efforts to collect information to the unlawful activities of the group, not peripheral matters which may be entirely lawful. These are similar to the "minimization procedures" required by the wiretap statutes to govern the collection of information obtained by electronic surveillance. While the use of informants does not raise the same Fourth Amendment concerns as a wiretap, the charter requires these procedures as a matter of sound policy.

The senior official who approves the infiltration is required to address these concerns in making a determination that it is appropriate to infiltrate the group. The aim of this requirement is to keep the focus of the investigative process on criminal activity, not legitimate First Amendment activities. At the same time, it is not so narrow as to require that information collection be confined to a single crime. The subsection uses the phrase "matter under investigation" advisedly to permit collection of information on planned criminal activity as well as completed acts and to encompass such legitimate investigative inquiry as the approach of one terrorist group to another group with a similar pattern of violent activity.

The final paragraph of subsection (b) specifies that evidence of violation of criminal law by informants contrary to the warnings provided by the FBI are to be reported to the Department of Justice, if the offense is federal, or to the appropriate investigative or prosecutive authorities at the State or local level. The use of the phrase "comes to the attention of the FBI" is designed to reflect a concept presently contained in the guidelines on use of informants. If the informant is acting for the FBI and violates instructions given him, there is a duty to report this whenever an experienced agent should realize that the violation has occurred. Concrete evidence sufficient to warrant a prosecution is not required. In

those rare instances in which the needs of the government's investigation outweigh the normal responsibility of the FBI to report an offense to the local prosecutive authorities promptly, the approval of the Attorney General or his designee to withhold notification is required. This also reflects a concept embodied in the present informant guidelines.

Any violation of law by an undercover agent of the FBI must also be promptly reported to the Department of Justice. This would not include, of course, activities sanctioned by the charter as a necessary part of undercover operations.

Section 533b(c) requires that any physical surveillance of an individual by the FBI be only for the purpose of an investigation authorized by the charter and that it be only for the purpose of that investigation.

Subsection (d) of section 533b is designed to insure that the search warrant requirements of Rule 41 of the Federal Rules of Criminal Procedure are complied with in connection with any mail opening and that Postal Service regulations governing mail covers are followed. It also requires Attorney General guidelines governing the use of these techniques.

Subsection (e) restates the existing requirement that statutes requiring judicial warrants for electronic surveillance, such as chapter 119 and 120 of Title 18 of the Code, be complied with. While virtually all electronic surveillance under the charter will fall within the provisions of chapter 119 concerning criminal investigations, the broader reference to applicable law is used since some terrorist cases involving groups which cross international boundaries fall within the terms of the Foreign Intelligence Surveillance Act, the new chapter 120.

Subsection (f) authorizes the FBI to issue investigative demands for documentary materials that are in the custody of third parties such as communications common carriers, insurance carriers or agents, or credit institutions that fall outside the Financial Privacy Act of 1978. Precedent for this authority can be found in the Inspectors General Act of 1978. That Act created the position of Inspector General in a dozen federal agencies and granted subpoena powers for use in both civil and criminal investigations. Similar authority exists in section 1968

of the RICO statute which authorizes the Attorney General to issue civil investigative demands in racketeering investigations "prior to the institution of a civil or criminal proceeding." Subpoena powers have also been authorized for over fifty federal departments, agencies, offices, commissions, and independent establishments for a variety of matters ranging from pesticide control to enforcement of the narcotics laws. The Internal Revenue Service and the Securities and Exchange Commission are two of the more prominent examples of agencies that have used subpoena powers with great effectiveness over the years to carry out their responsibilities.

As the FBI shifts its investigative priorities to white collar crime, organized crime and public corruption, there is a growing need for some form of compulsory process. It is difficult to detect these crimes without a lengthy and painstaking examination of books and records. It was common practice in the past for the custodians of those records to furnish them voluntarily to the FBI. That is no longer true. Although many of the custodians desire to cooperate with the government, they are reluctant to do so because they are fearful of legal liability or loss of trade. As a result, the FBI cannot obtain many of these records without a search warrant or a grand jury subpoena. Search warrants are not particularly useful in these cases; they require more information than is normally available in the early stages of an investigation. Grand jury subpoenas have proven to be effective when they are used, but they are not available unless the inquiry is material to or incidental to an ongoing grand jury investigation. It has been said that "[t]ust as the grand jury is not meant to be 'the private tool of the prosecutor' it should not become an arm of the FBI." *In re Stolar*, 397 F.Supp. 540 (S.D.N.Y., 1975). This makes it difficult for the FBI to obtain some of the records it needs not only in the areas of white collar crime and public corruption, but also in certain fugitive investigations where there is no indictable offense. Ibid.

Although the charter grants the FBI new authority with respect to certain third-party records, it does so in a manner that enhances the privacy interests involved. To begin with, the restrictions imposed generally parallel those contained in the Right to Financial Privacy Act of 1978. Secondly, the authority extends only to certain categories of records and only to those records held by third party custodians. A demand cannot be issued to the holder of a record who is himself the subject of investigation. In addition, the subsection formalizes the methods and procedures by which the FBI can obtain access to such records. For example, the FBI may obtain the records only if they are reasonably described and the subject of the records

consents, an authorized investigative demand has been issued, or there is a subpoena or court order to produce the records. There must be a reason to believe that the records are relevant to a criminal investigation under section 533 and a copy of the demand must be served on the subject of the records or mailed to his last known address prior to, or at the time the demand is served on the custodian. As described below, this notice may be delayed, in certain circumstances, only upon a written finding of the Attorney General. The provisions of this subsection will provide greater uniformity of procedures throughout the country, and more importantly, will end the practice of relying on informal access to acquire needed record information.

The reasonableness of an investigative demand would be measured by the same rules that apply to a subpoena duces tecum in connection with a grand jury investigation. Further, the applicability of a privilege barring disclosure of the records would also be measured by this same test.

The Attorney General or his designee would be empowered to delay notice to the record subject upon a written finding that the investigation is within the lawful jurisdiction of the FBI and there is reason to believe the records are relevant to the investigation and that there is also reason to believe that notifying the subject would result in: (1) endangering life or physical safety; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing the investigation or delaying a trial or other official proceeding then underway. Notice could be delayed for periods up to 90 days.

The record subject notified of an investigative demand by the FBI would be authorized to challenge the demand promptly before a U.S. Magistrate on legal grounds, including an argument that the records are not relevant to a lawful investigation.

A record custodian on whom a demand has been served would be obligated to make the records available for inspection or reproduction. If the demand includes a finding that notice to the subject must be delayed, the custodian would also have an obligation to take reasonable steps to prevent disclosure of the existence of the demand to the record subject. The Attorney General would be authorized to enforce investigative demands upon application to the U.S. Magistrate in the appropriate district. A Magistrate's decision on the lawfulness of the demand would not be appealable.

In addition to providing authority for investigative demands with respect to insurance, communications toll, and credit records outside the scope of the Right to Financial Privacy Act, the charter would also explicitly authorize the FBI to issue demands within the terms of, and in accordance with the procedures of, the Right to Financial Privacy Act. Unlike the Internal Revenue Service, the Securities and Exchange Commission, the Inspectors General, and certain other federal enforcement agencies, the FBI has never had such authority and thus is handicapped in enforcing the law in instances in which financial records are important. Without in any way altering the Right to Financial Privacy Act, the charter would permit the FBI to use investigative demand authority recognized in that Act.

The provisions of the charter, like section 1117(c) of the Right to Financial Privacy Act, protect a third party record custodian from liability for disclosure of a record in good faith reliance upon an investigative demand issued by the FBI.

Paragraphs (10) and (11) of subsection (f) also follow the Right to Financial Privacy Act in exempting from the requirement of notice to the record subject, requests dealing only with the name, address, account number or type of account, and in providing that the procedures provided under the Federal Rules of Civil and Criminal Procedure are not affected by the investigative demand provisions.

Section 533b(g) restates the existing requirement of compliance with the Tax Reform Act of 1976 in seeking tax returns or return information from the Internal Revenue Service. Thus, the formal request for records and the procedural requirements of that Act must be followed. Further use or dissemination of those records will continue to be governed by §6103 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6103) and any regulations promulgated thereunder.

Subsection (h) addresses generally the subject of sensitive investigative techniques not separately covered in the charter. It limits the use of techniques such as electronic location detectors (beepers), covert photographic surveillance and pretext interviews to criminal investigations authorized under section 533 and requires Attorney General guidelines governing the use of these techniques.

Section 533c acknowledges the authority of the FBI to retain information it collects when pertinent to and within the scope of the responsibilities defined in the charter. With respect to information collected in the course of criminal investigations under section 533, the FBI is authorized to disseminate the information to federal agencies, or state or local criminal justice agencies if the information is within the investigative jurisdiction of the agency, may assist in preventing a crime, reflects on the integrity of a member of a criminal justice agency, is required to be disseminated under Executive Order 10450 (concerning security of federal employees), or is otherwise permitted to be disseminated under the terms of the Privacy Act or Executive Order 10450. It is important to note, however, that any such dissemination must be consistent with the provisions of the Freedom of Information Act and the Privacy Act and must comport with guidelines issued by the Attorney General. Further, the dissemination under Executive Order 10450 referred to here relates only to information collected in the course of a criminal investigation — not all information in the possession of the FBI.

Section 533c also contains an explicit requirement for the FBI to destroy records compiled in the course of

criminal investigations ten years after the close of the investigation or of a prosecution in which it results. In lieu of destruction, the records could be transferred to the Archives for historic preservation, in appropriate cases. Exceptions to the ten year retention period would be required when necessary to pending or anticipated litigation — civil or criminal — when there is a pending Freedom of Information or Privacy Act request, or when retention is required under the record keeping provisions of the electronic surveillance act. Further, the Director of the FBI could permit retention of records beyond the ten year period if the file is needed for "investigative reference" (for example, in the organized crime field), is to be used as a training aid, or is needed for an administrative purpose within the FBI.

Section 534 is designed to embody as permanent legislation the provisions to facilitate undercover operations temporarily adopted as part of the Department's 1979 authorization. In essence, it allows the FBI to exempt from normal procurement restrictions those undercover operations which cannot be successfully carried out under such restrictions. These are detailed in a lengthy memorandum to the Attorney General, dated July 27, 1978, which was furnished to the Congress. They include such provisions as 31 U.S.C. 484 which would otherwise require that gross receipts of an undercover operation be deposited in the Treasury without any deduction of expenses; 18 U.S.C. 648 and 31 U.S.C. 521 which limit authority to deposit cover funds in a bank or financial institution; 31 U.S.C. 665(a) and 41 U.S.C. 11(a) which restrict government leases to the current fiscal year; 31 U.S.C. 529 and 41 U.S.C. 255 which could be construed to limit authority to make advance payments on leases; specific restrictions on leases in the District of Columbia, 40 U.S.C. 34 and 40 U.S.C. 71 et seq; provisions which require specific clauses to be contained in government contracts or leases, 41 U.S.C. 22, 254(a) and (c); and similar provisions which cannot be complied with because the government must conceal its participation in an undercover activity. Section 534 specifies that these exemptions from existing law are to be used only when necessary and that their use is to be governed by

Attorney General guidelines. Further, the liquidation of any sizeable proprietary would be subject to review by the Attorney General and the Comptroller General.

To safeguard against new procurement restrictions unintentionally limiting the conduct of undercover operations, section 534 requires that any such law express a clear intent to modify any of the authorities the section provides.

Subchapter V of the new FBI charter deals with investigative responsibilities of the FBI outside the criminal field.

Section 535 confirms the authority of the FBI to investigate in civil cases within the enforcement responsibility of the Department of Justice, such as civil fraud, civil rights, and civil antitrust matters. It makes clear that this investigative authority is not limited to cases brought by the Department but extends to matters in which the United States is the defendant, such as tort cases, or matters in which the United States intervenes, as in certain civil rights cases. These investigations would be conducted on request of the Attorney General or his designee.

Section 535a permits the FBI to collect information relating to serious civil disorders and those demonstrations which require some form of federal permit or federal assistance. Under chapter 15 of Title 10 of the U. S. Code, the President is authorized to use troops to enforce federal law or protect civil rights and to provide troops to assist the States in the event of a civil disorder. The Attorney General advises the President whether the facts of a particular disorder warrant this form of intervention. Section 535a authorizes the FBI to acquire these facts.

The section also recognizes that certain entirely lawful and peaceful demonstrations impose responsibilities on the federal government to issue parade permits, restructure traffic and parking patterns, and insure adequate health and safety facilities. To discharge these

responsibilities the government must have information concerning the number of demonstrators expected, how they plan to travel to the site, how long they will stay, etc. The charter would permit the FBI to acquire this information with the specific approval of the Attorney General or his designee.

Section 535a requires the FBI to limit its collection of information in these instances only to facts which will assist the Attorney General in determining whether the use of troops or the provision of federal assistance is required. The Attorney General would be required to enforce guidelines (which have already been issued) to insure that information is collected insofar as possible from publicly available sources and that mail surveillance, electronic surveillance, access to third party or tax records is not used to collect this information in connection with civil disorders except with his approval in exigent circumstances. Under no circumstances may these techniques be used to collect information on demonstrations. Further the guidelines must provide that information will be stored in a manner that minimizes its retrieval by reference to a specific individual. Thus, information about a demonstration would be indexed by reference to the event, not the individuals participating.

Section 535b authorizes the FBI to conduct complete background investigations, as distinguished from simply checking existing files and records, under certain limited circumstances. It substantially reduces the FBI's role in this regard. As explained hereafter, statutes authorizing the FBI to conduct background investigations for certain agencies are being repealed.

Background investigations would be authorized for persons being considered for appointment to positions requiring the advice and consent of the Senate. These investigations would be initiated only on written request of the President or his designee or, in transition years, a President-elect or his designee. The individual to be investigated must have consented to being considered for the appointment. If the President or his designee certifies

that a position in the Executive Office of the President requires access to classified information, the FBI would also be authorized to conduct a background investigation of a person being considered for appointment to that position, but it would not investigate all appointments to the White House staff or other positions in the Executive Office of the President.

The FBI would also be authorized to investigate the background of those who apply for appointment in the FBI or those being considered for positions in other parts of the Department of Justice which the Attorney General determines require a full field investigation. Judicial nominees would also be investigated, upon request of the officials in the Department of Justice who process judicial appointments for the President. On request, the FBI would also continue to conduct background investigations of pardon applicants. It would also be authorized to conduct background investigations of others, such as defense attorneys in certain cases, who the Attorney General determines must be given access to classified information.

In 1977 and 1978, the FBI conducted background investigations for appointment to the staff of twelve separate congressional committees. The charter would reduce this number substantially by providing for investigation, at the request of the Committee Chairman, only for the Appropriations Committees and the Committees on the Judiciary of each House, and the two intelligence committees. It would also authorize investigations for members of the staff of the House and Senate leadership. Investigation would be authorized only for those potential staff members the requesting official certifies must be given access to classified information. It is recognized that Congress may wish to provide for background investigations of the staff of certain other, temporarily created, committees but it is expected that this would be done by the resolution creating the committee. The FBI would be reimbursed for this service to the Congress.

Similarly, the FBI would continue to conduct background investigations, on request of the courts, but only for those being appointed to the quasi-judicial positions of magistrate or bankruptcy judge, or persons being appointed under the courts special authority relating to special prosecutors.

Section 535c authorizes the FBI to continue providing information from its files to assist other federal agencies conducting background investigations. This authority would extend not only to the traditional national agency checks connected with government employment, but also to security clearance checks of contractors and their employees, others having access to classified information, and persons being checked by the Secret Service in connection with access to the White House or other buildings under its protection. Federal agencies checking applicants for grants or loans would also be permitted to request a review of FBI files if the Attorney General authorizes this practice. Presently, the Small Business Administration uses a check of FBI files to protect against inadvertent funding of businesses established by organized crime. This is an example of the type of check contemplated in section 535c.

Section 535d permits the FBI to perform special service functions, most of which it is already performing without explicit statutory recognition. For example, it authorizes investigative assistance to the Appropriations Committees of the Congress, the Judiciary Committees and the Intelligence Committees, if the Committee Chairman requests such assistance and the Attorney General or his designee approves. Assistance to the Department's Office of Professional Responsibility and other components of the Department of Justice would be authorized, as well as assistance to Grand Juries conducting investigations of matters to which the investigative jurisdiction of the FBI extends. When approved by the Attorney General or his designee, the FBI could also provide investigative assistance to other federal law enforcement agencies or to state or local law enforcement agencies if the assistance is necessary and serves a substantial federal interest. Finally, section 535d authorizes the FBI to provide protective services on request of the Attorney General, either for the protection of officials of the Department itself, or the protection of witnesses of importance in Department cases.

Subchapter VI of the charter deals with the support functions which the FBI provides to the law enforcement community in general -- foreign as well as federal, state and local.

Section 536 replaces the existing training authority of the FBI set forth in 42 U.S.C. 3744. It authorizes the FBI to train its own personnel as well as law enforcement and criminal justice personnel of other federal agencies, foreign governments, and state or local agencies. The term, law enforcement personnel, includes personnel who have responsibility for personnel and physical security of installations, agencies, foreign governments, and state or local agencies. The section also authorizes the FBI to conduct or contract for research and development related to law enforcement and to exercise procurement authority related to its investigative responsibilities.

Section 536a expressly authorizes FBI foreign liaison activities. It recognizes the presence of the FBI Legal Attaches abroad. It authorizes the FBI to make inquiries of foreign law enforcement agencies on its own behalf and on behalf of other federal agencies conducting criminal or background investigations. It permits the FBI to perform this same function of forwarding inquiries to foreign law enforcement agencies on behalf of state or local law enforcement agencies, but limits this authority to criminal investigations only.

The FBI would also be authorized to conduct investigations in the United States, at the request of foreign law enforcement agencies, to locate fugitives or obtain information to assist the foreign government in a criminal investigation but this could be done only with the approval of the Director or his designee. The FBI could investigate for a foreign agency only if the underlying conduct is proscribed in American criminal law (State or federal) and it would be subject to the same restrictions on sensitive techniques that govern its own investigations. The FBI would be permitted to exchange criminal investigative information, technical and scientific information from its files with foreign agencies conducting criminal investigations. The reference to security as well as law enforcement agencies in connection with this particular provision recognizes that in some countries it is the security agency, rather than the regular police agency that has responsibility for terrorist matters.

Finally, the FBI is authorized to assist foreign law enforcement and security agencies in conducting background investigations relating to government employment, security clearances, licensing, visas or immigration. The foreign agency would be required to give assurances that the individual has consented to the investigation and that it is being conducted for one of the enumerated purposes. With these assurances the FBI would provide the needed information to the foreign agency.

Section 536b expressly authorizes the technical assistance functions now performed by the FBI. It permits identification assistance in civil disaster and missing person cases, at the request of another federal agency or a foreign, state or local agency. Such assistance could also be provided on request of a railroad or airline. The FBI would be authorized to provide laboratory, identification, technical and scientific assistance in federal investigations, whether civil or criminal, and in state and local criminal investigations. Expert testimony could also be provided in court proceedings in the United States and abroad to support the identification, technical or scientific assistance rendered. Further, section 536b would permit the FBI to conduct "sweeps" of federal buildings at the request of a federal agency, a congressional committee or a U. S. court to detect electronic surveillance. Additional authority to provide scientific or technical analyses at the request of federal, state or local agencies would be provided where the material to be analyzed is of historic significance. While this authority would seldom be used, there are instances where the FBI's capability in, for example, the document inspection area, would make it appropriate to conduct such an examination.

Section 536c expands upon the authority in the present 28 U.S.C. 533 (2) to provide protective assistance to the Secret Service. It would authorize the FBI to provide such assistance in connection with all protectees of the Secret Service, not just the President, and would also explicitly provide for informational and investigative assistance in connection with protective responsibilities.

The FBI could only conduct investigations at Secret Service request, however, if the provisions of section 533 are met. It should be emphasized that this cooperation with Secret Service is in addition to the responsibility of all federal agencies to provide assistance to the Secret Service under Public Law 90-331.

Section 536d restates the authority contained in the present 28 U.S.C. 534 to exchange crime records with criminal justice agencies. It recognizes that the FBI collects civil fingerprint records (which includes, among others, military fingerprints of a non-criminal nature) as well as criminal records and that crime statistics, stolen property records and missing person records are collected also. The reference to criminal statistics specifies that these shall be collected only to the extent authorized by the Attorney General so as to insure that there will be no duplication of effort if a criminal statistics office is created elsewhere in the Department of Justice.

The FBI would be authorized to exchange the information collected with criminal justice agencies of federal, state or local government (including law enforcement, prosecutors, courts and parole officers) and also with law enforcement or security agencies of foreign governments. Non-governmental law enforcement organizations, such as railroad police, who are authorized by state statute to investigate crimes and make arrests would also be able to obtain this information. The section makes it explicit that criminal justice agencies may obtain such information not only for law enforcement purposes but also in checking the background of persons they employ or intend to employ.

Exchange of records for purposes other than criminal justice are authorized in section 536e. Fingerprint records and rap sheets held by the FBI would be permitted to be exchanged with federal agencies having licensing, registration, visa, immigration or passport responsibilities. The authority contained in Public Law 92-544 to exchange such records with federally-chartered or insured banking institutions and with state or local agencies authorized by state statutes to obtain such information for employment or licensing purposes would be continued. Section 536e also cross-references the authority of securities industry clearing

houses to obtain this information. Finally, exchange with foreign governments for purposes of administering visa, immigration or passport laws would be permitted. With respect to all of these exchanges for purposes other than the administration of criminal justice (including the employment checks for federal agencies authorized by section 535c), no arrest record more than a year old could be disseminated if it failed to reflect the disposition of the charges, i.e., dismissal, acquittal, diversion, conviction, etc. This limitation on the exchange of stale arrest records expands the policy of 28 C.F.R. §50.12 to cover exchanges with federal agencies as well as state and local.

Section 536f requires the Attorney General to adopt guidelines for the disposition of unsolicited information which is received by the FBI, but does not relate to its functions. Such information could not be retained except for the limited time period needed to determine whether in fact the information relates to FBI responsibilities and perform administrative duties relating to the logging of correspondence.

Section 537 authorizes the Director of the FBI to impose a civil penalty on any employee of the FBI who intentionally uses any of the sensitive investigative techniques described in section 533b in knowing violation of the charter. These techniques include the use of informants or undercover agents, physical surveillance, mail surveillance, electronic surveillance, investigative demands for records, trash covers, pretext interviews and covert photographic surveillance. The penalty would be in addition to the Director's normal disciplinary authority. With respect to present employees, the Director would be required to afford procedural due process equivalent to that provided in the Civil Service Reform Act. In imposing a civil penalty on a former employee, the Director would be required to follow the normal procedures of the Judicial Code governing the recovery of civil fines, penalties and forfeitures.  
28 U.S.C. 2461-2465.

Section 537a makes clear that the FBI charter is not intended to create any new causes of action or to provide an independent basis for motions to quash or to exclude evidence. The disclaimer does not affect existing causes of action or suppression claims.

Section 537 also rectates the penalty clause of the present 28 U.S.C. 534 concerning the cancellation of FBI records exchange with any agency which improperly disseminates records received from the FBI.

Section 537b provides that guidelines established to implement the charter and procedures, manuals and operational instructions developed by the FBI can be protected from public disclosure in those instances in which disclosure would jeopardize the investigative process. Otherwise, all guidelines shall be made public.

Section 537c affirms the obligations of the Attorney General and the Director of the FBI to keep the Judiciary Committees of the Congress advised of FBI activities in order to facilitate their oversight role. It requires an annual report to the Congress concerning the investigative activities of the FBI and reduces to statutory form the present commitment of the Attorney General to provide copies of proposed guidelines to the Congress for review and comment.

Most of the remaining sections of the bill consist of technical amendments to various portions of the U. S. Code and repeals of certain statutes.

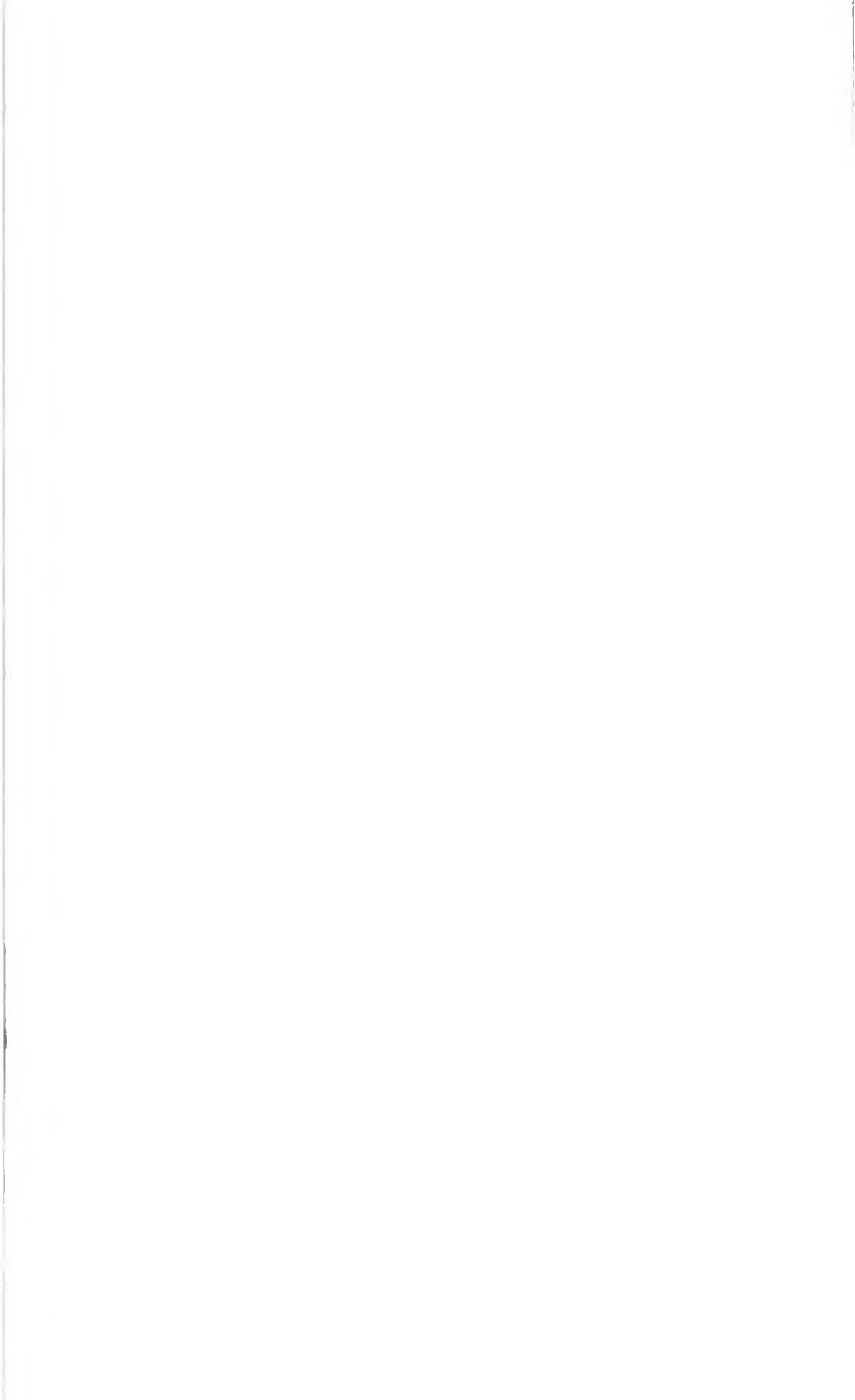
Section 7 makes a number of conforming amendments in Title 28 to restate provisions displaced by the new chapter 33. It creates a new section 513A in Title 28 to make clear that the Attorney General retains the investigative authority presently conferred on him by 28 U.S.C. 533. In addition, it adds a new provision directly empowering the Attorney General to protect the confidentiality of informants and investigative sources and methods. This language makes explicit the authority of the Attorney General to assert a claim of privilege in the courts. It is not intended to affect the power of the federal courts to rule on claims of privilege or to apply presumptions or sanctions authorized by the Federal Rules of Criminal Procedure.

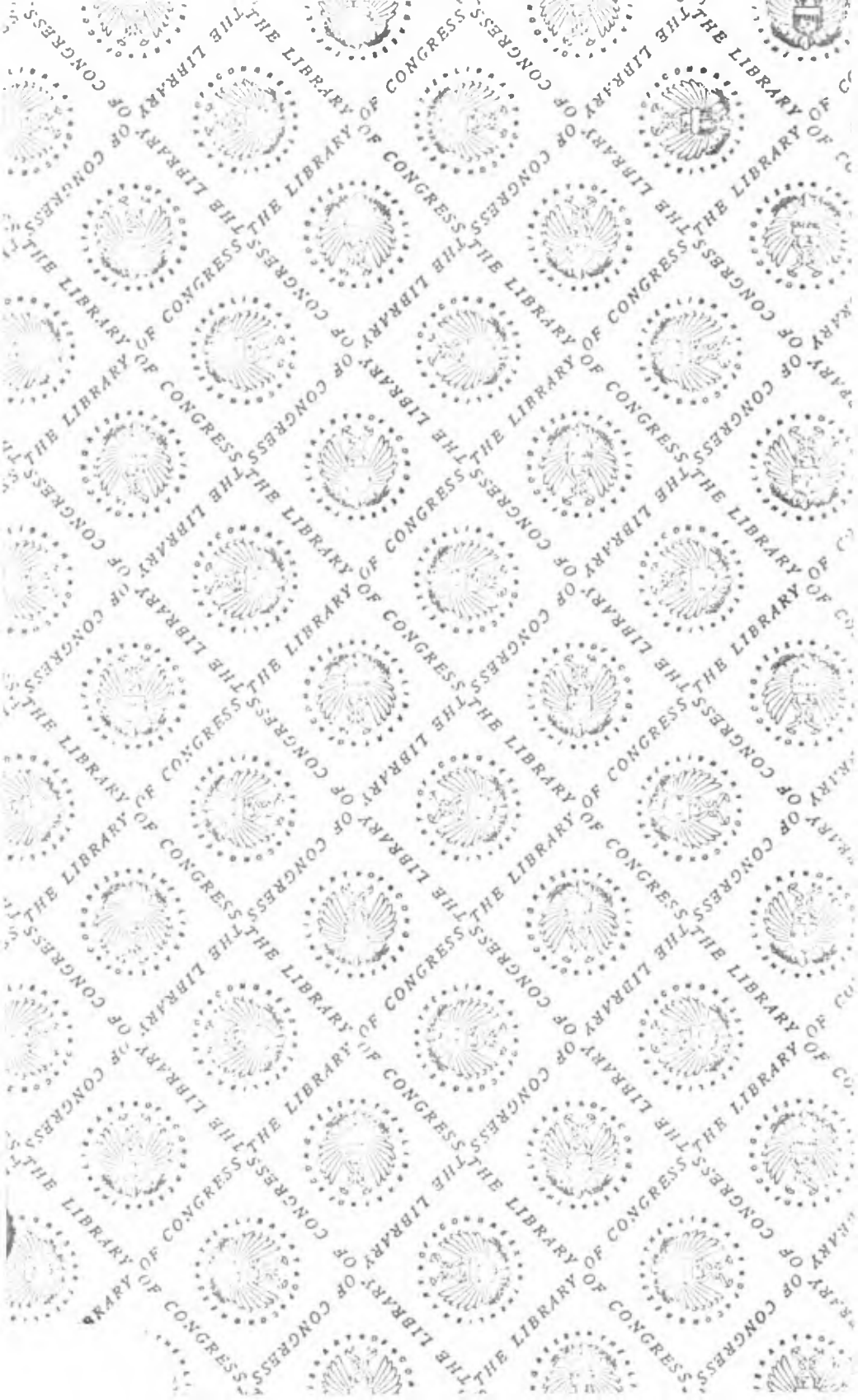
The remainder of the new section 513A restates the provision presently found in 28 U.S.C. 535 concerning the reporting by federal agencies of violations of law by their employees. Section 7 of the bill adds another new provision to chapter 31 of Title 28 making explicit the Attorney General's responsibility to insure that FBI investigations are conducted in accordance with law and do not abridge constitutional rights.

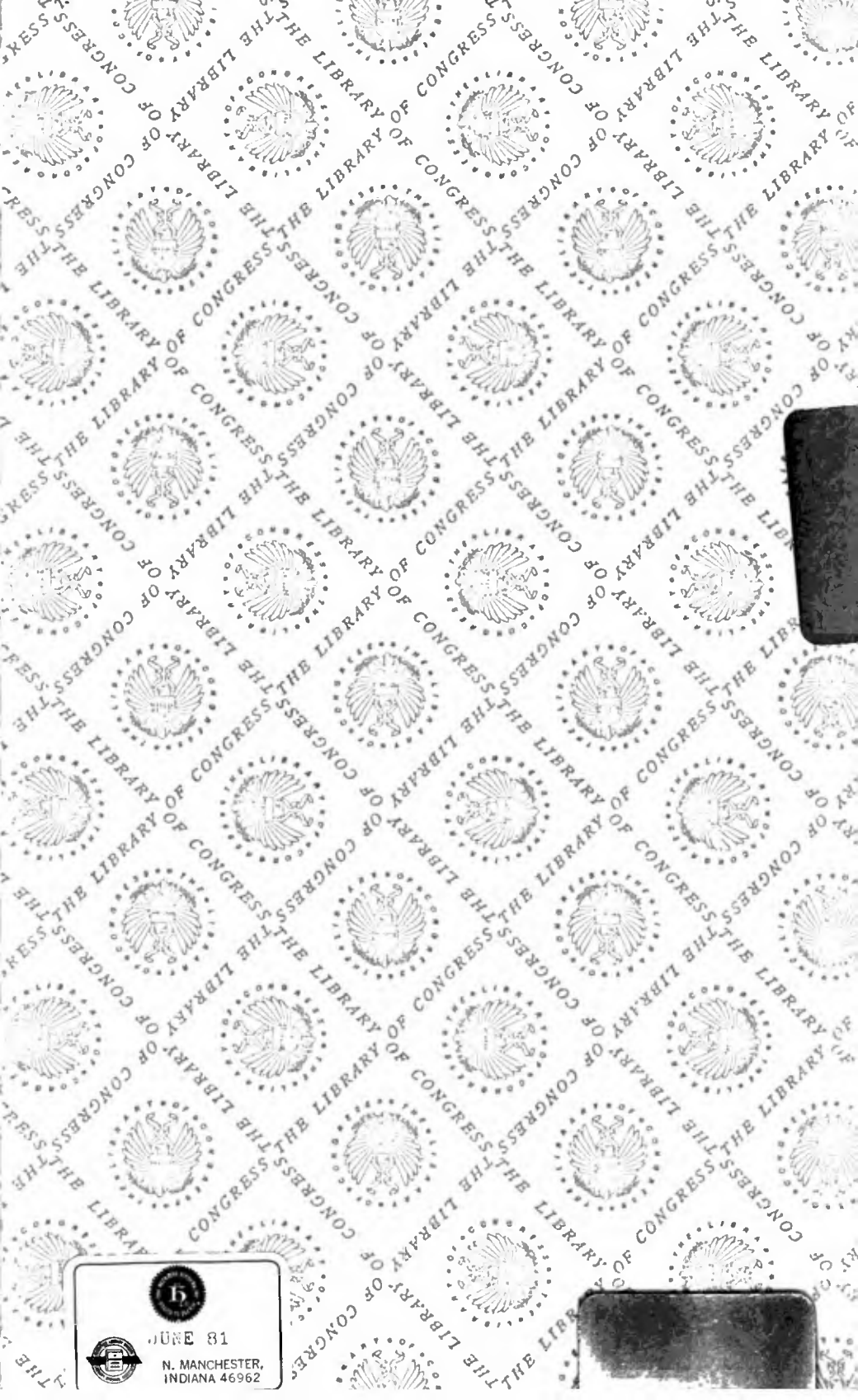
Section 12 establishes an effective date for the charter and related amendments, which would enter into effect 90 days from the date of enactment.



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